No. 97-1927-CFX

Title: Rodney C. Hanlon, Joel Scrafford, Kris A. McLean, Richard C. Branzell, and Robert Prieksat, Petitioners
v.
Paul W. Berger, et ux.

Docketed:
May 29, 1998

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	May 26 1998	Petition for writ of certiorari filed. (Response due July 27, 1998)
	Jun 12 1998	Order extending time to file response to petition until July 27, 1998.
	Jun 24 1998	Waiver of right of respondent United States to respond filed.
	Jul 27 1998	Brief of respondents Paul Berger and Erma Berger in opposition filed.
	Aug 12 1998	DISTRIBUTED. September 28, 1998
	Aug 14 1998	Reply brief of petitioners Rodney Hanlon, et al. filed.
	Oct 14 1998	REDISTRIBUTED. October 30, 1998
	Nov 2 1998	REDISTRIBUTED. November 6, 1998
	Nov 9 1998	Petition GRANTED. limited to the following questions: 1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant? 2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to a defense of qualified immunity? The case is consolidated with No. 98-83, Wilson v. Layne, and a total of one hour is allotted for oral argument. SET FOR ARGUMENT March 24, 1999.
		**********
	Dec 28 1998	Joint appendix filed.
	Dec 28 1998	Brief of petitioners Rodney Hanlon, et al. filed.
	Dec 28 1998	Brief amici curiae of ABC, Inc., et al. filed.
	Dec 28 1998	Brief of respondents Cable News Network, et al. in support of petition filed.
	Jan 26 1999	Brief amicus curiae of Pacific Legal Foundation filed.
	Jan 27 1999	Brief of respondents Paul Berger and Erma Berger filed.
	Jan 27 1999	Brief amicus curiae of Association of Criminal Defense Lawyers filed.
	Jan 27 1999	Brief amicus curiae of National Assn. of Securities and Commercial Law Attorneys filed.
	Feb 8 1999	Motion of the parties respecting oral argument filed.
	Feb 11 1999	CIRCULATED.
	Feb 22 1999	Motion of the parties respecting oral argument GRANTED. and the time is allotted as follows: 20 minutes for petitioners Hanlon, et al., in No. 97-1927 and for federal respondents Layne, et al., in No. 98-83; 10 minutes for state respondents in No. 98-83; 15 minutes for respondents Berger, et ux., in No. 97-1927; and 15 minutes for petitioners Wilson, et al., in 98-83.
	Mar 1 1999	A total of ten additional minutes for oral argument are

No. 97-1927-CFX

Entry	Date	Proceedings and Orders
		allotted to petitioners Hanlon, et al.; federal respondents Layne, et al.; and state respondents. A total of ten additional minutes for oral argument are allotted to respondents Berger, et ux. and petitioners Wilson, et al.
	Mar 1 1999	Reply brief of petitioners Rodney Hanlon, et al. filed.
	Mar 4 1999	Reply brief of respondents Cable News Network, et al. in support of petitioners filed.
	Mar 11 1999	Record filed.
	Mar 11 1999	Record filed.
	Mar 24 1999	ARGUED.

Supreme Court, U.S.
FILED

No. 97-971927 MAY 26 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

RICHARD A. CORDRAY
Counsel of Record
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

81 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that law enforcement officers violated clearly established law, and thus were not entitled to qualified immunity, when at the time they acted there was no decision by the Supreme Court or any other court so holding, and the only lower court decisions addressing the issue had found the same conduct did not violate the law?

2. Whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them in order to observe and report on their conduct in properly executing a valid warrant?

PARTIES TO THE PROCEEDING

The petitioners in this case are all federal law enforcement officials. Petitioners Rodney Hanlon, Joel Scrafford, Richard C. Branzell, and Rodney Prieksat are special agents of the United States Fish and Wildlife Service in the Department of the Interior. Petitioner Kris A. McLean is an Assistant United States Attorney. Petitioners are defendants in this case and were the appellees in the court below. Also named as defendants in this case were the United States of America (which was substituted as a party for purposes of the claim of trespass asserted originally against Kris McLean), as well as Turner Broadcasting Systems, Inc. and two of its employees, Robert Rainey and Donald Hooper. The petitioners are all individuals, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Paul W. Berger and his wife Erma R. Berger are the plaintiffs in this case, and they were the appellants in the court below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

STATEMENT OF JURISDICTION 3

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. The Fish and Wildlife Service Investigation 4

B. The Execution of the Search Warrant 5

C. The District Court Proceedings 6

D. The Decision by the Court of Appeals 7

TABLE OF CONTENTS
(continued)

PAGE

REASONS FOR GRANTING THE WRIT 9

I. THE NINTH CIRCUIT BROKE WITH COURT PRECEDENT BY HOLDING THAT OFFICERS VIOLATED CLEARLY ESTABLISHED LAW AT A TIME WHEN NO CONTROLLING DECISIONS SO HELD AND EVERY COURT TO RULE ON THIS CONDUCT HAD FOUND IT LAWFUL 10

II. THE CIRCUITS ARE SPLIT ON WHETHER OFFICERS VIOLATE CLEARLY ESTABLISHED LAW BY ALLOWING THE NEWS MEDIA TO ACCOMPANY THEM AND REPORT ON THE EXECUTION OF A VALID WARRANT 16

CONCLUSION 22

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 2, 10, 15, 17
Avenson v. Zegart,
577 F. Supp. 958 (D. Minn. 1984) 11, 17
Ayeni v. Mottola,
35 F.3d 680 (2d Cir. 1994),
cert. denied, 115 S. Ct. 1689 (1995) ..... *passim*
Bartlett v. Fisher,
972 F.2d 911 (8th Cir. 1992) 13
Bills v. Aseltine,
52 F.3d 596 (6th Cir. 1995) 17
Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) 6
Cullinan v. Abramson,
128 F.3d 301 (6th Cir. 1997),
cert. denied, 66 U.S.L.W. 3704 (Apr. 27, 1998) 13
Davis v. Scherer,
468 U.S. 183 (1984) 15
Elder v. Holloway,
510 U.S. 510 (1994) 14, 15
Harlow v. Fitzgerald,
457 U.S. 800 (1982) 2, 10, 12, 15, 18
Higbee v. Times-Advocate,
5 Med. L. Rep. (BNA) 2372
(S.D. Cal. Jan. 9, 1980) ..... *passim*
Hunter v. Bryant,
502 U.S. 224 (1991) (per curiam) 12
Jenkins ex rel. Hall v. Talladega City Bd. of Educ.,
115 F.3d 821 (11th Cir.) (en banc),
cert. denied, 118 S. Ct. 412 (1997) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Malley v. Briggs,
475 U.S. 335 (1986) 12, 15, 21
Mitchell v. Forsyth,
472 U.S. 511 (1985) ..... *passim*
Moncrief v. Hanton,
10 Med. L. Rep. (BNA) 1620
(N.D. Ohio Jan. 6, 1984) ..... *passim*
Parker v. Boyer,
93 F.3d 445 (8th Cir. 1996),
cert. denied, 117 S. Ct. 1081 (1997) ..... *passim*
Prahl v. Brosamle,
295 N.W.2d 768 (Wis. Ct. App. 1980) ..... *passim*
Procunier v. Navarette,
434 U.S. 555 (1978) 2, 12, 14, 22
Scheuer v. Rhodes, 416 U.S. 232 (1974) 15
United States v. Dellinger,
No. 69 CR 180 (N.D. Ill. Feb. 20, 1970),
rev'd, 472 F.2d 340 (7th Cir. 1972) 11
United States v. O'Neal,
No. KC-CR-1204 (D. Kan. Sept. 1, 1970),
app. dismissed, 453 F.2d 344 (10th Cir. 1972) 12
United States v. United States Dist. Ct.,
407 U.S. 297 (1972) 11
Wilson v. Layne,
110 F.3d 1071 (4th Cir. 1997), *aff'd*,
Nos. 96-1185 & 96-1188, 1998 WL 159673
(4th Cir. Apr. 8, 1998) (en banc) 8, 18, 19
Wilson v. Layne,
Nos. 96-1185 & 96-1188, 1998 WL 159673
(4th Cir. Apr. 8, 1998) (en banc) 15, 19, 20, 21

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. IV ..... *passim*
7 U.S.C. § 136j(a)(2)(G) 4
28 U.S.C. § 1254(1) 3
Fed. R. App. P. 41 3

Other Authorities

Richard H. Fallon & Daniel J. Meltzer,
New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731 (1991) 14
Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115 (1991) ... 14
Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*,
23 GA. L. REV. 597 (1989) 14
James Flynn Mozingo, *The Confounding Prong of the* Harlow v. Fitzgerald *Qualified Immunity Test: When Is a Constitutional Right Clearly Established?*,
17 AM. J. TRIAL ADVOC. 797 (1994) 13
Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*,
35 ARIZ. L. REV. 621 (1993) 13

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners respectfully petition for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

The ruling below sharply undermines the defense of qualified immunity that the Court has extended to federal, state, and local officials. The Court has consistently stressed that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question.

See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Before an official may be stripped of the defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which means that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The core issue in this case, which cries out for uniform treatment in the lower courts, is which sources of law may bear upon this determination when no controlling authority from the Supreme Court or the relevant lower court of last resort has addressed the specific legal issue at stake.

At the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. Indeed, the only three lower courts faced with the issue had upheld the lawfulness of such conduct. In these circumstances, it was egregious error for the Ninth Circuit to invalidate the defense of qualified immunity. Indeed, on the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), the ruling below should be summarily reversed. This disposition would strongly reaffirm the Court's previous admonition that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

Moreover, the lower federal courts are divided on the specific constitutional issue underlying the defense of qualified immunity raised in this case. Like the District Court here, the Eighth Circuit and the Fourth Circuit have upheld qualified immunity for law enforcement officers who allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. In reversing the District Court, the Ninth Circuit rejected these decisions and sided instead with the Second Circuit, which denied qualified immunity in the same situation. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented on the qualified immunity issues that are cleanly presented in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is reported as *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), is reprinted in the Appendix to this petition ("Pet. App.") at 1a-26a. The Ninth Circuit's opinion reversed an order and opinion of the United States District Court for the District of Montana, which had granted summary judgment to petitioners and upheld their defense of qualified immunity. The District Court's opinion is unreported (except as *Berger v. Hanlon*, 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996)), and is reprinted at Pet. App. 27a-47a. The Ninth Circuit denied a timely petition for rehearing and suggestion of rehearing *en banc*. *Id.* at 48a. The Ninth Circuit entered an order on March 13, 1998, which stayed the mandate in this case, pursuant to Federal Rule of Appellate Procedure 41, pending the filing of a petition for writ of certiorari in this Court. *Id.* at 50a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit denied rehearing and rejected the suggestion of rehearing *en banc* on February 25, 1998. Pet. App. 48a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Fish and Wildlife Service Investigation.

This lawsuit stems from an investigation of respondents by the United States Fish and Wildlife Service in the Department of the Interior. The investigation occurred after federal officials received complaints and information from former employees of the Bergers, who indicated that Mr. Berger was violating federal law by using poisons to kill predators on his ranch, including eagles. Pet. App. 4a. The investigation ultimately resulted in the filing of criminal charges against Mr. Berger, who was convicted of using a registered pesticide (Furadan) in a manner inconsistent with its labeling, which was in violation of 7 U.S.C. § 136j(a)(2)(G). *Id.* at 7a. He was acquitted on various other counts.[1]

Petitioners in this case are four special agents of the United States Fish and Wildlife Service in the Department of the Interior and an Assistant United States Attorney who helped to plan and participated in the investigation. In the course of their investigation, they learned that Mr. Berger had allegedly poisoned or shot numerous eagles on his ranch over the years. Pet. App. 4a. In an effort to obtain evidence concerning these allegations, petitioners sought a warrant to search the Bergers' ranch, which covers about 75,000 acres in Montana. In response to their application, a magistrate judge issued a search warrant for the Berger ranch, which authorized the search of the ranch and all appurtenant structures, excluding the residence, for evidence indicating the illegal taking of wildlife. *Id.* at 5a. The reasonableness and validity of this warrant has never been in question in these proceedings.

Shortly before the federal agents applied for the warrant, they had been approached by employees of Turner Broadcasting System (TBS) and Cable News Network (CNN), to discuss whether an arrangement could be worked out to allow them to

[1] The facts alleged in the criminal information were that Mr. Berger laced sheep carcasses with Furadan, with the intent of killing predators, including eagles. Pet. App. 7a.

accompany the federal agents and observe and report on their conduct in properly executing the warrant. The court below succinctly described their objectives as follows: "The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime." Pet. App. 4a.

After some discussion of the matter, petitioner Kris McLean, the Assistant United States Attorney in charge of the Berger investigation, ultimately reached a letter agreement with an employee of CNN, confirming that the Office of the United States Attorney for the District of Montana would allow CNN to accompany federal agents "as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." Pet. App. 4a. The letter agreement specifically contemplated that CNN would shoot video footage of the agents' attempt to execute the search warrant, but placed any such videotape under embargo until any resulting criminal proceedings had been effectively concluded. *Id.* at 4a-5a.

B. The Execution of the Search Warrant.

On the morning of March 24, 1993, a team of federal law enforcement officers (including petitioners here), accompanied by a CNN media crew, proceeded in a caravan to a point near the Bergers' ranch. The officers were audiotaped and videotaped by the media crew at all times. Mr. Berger met the caravan on the road leading up to the ranch. The officers informed Mr. Berger that they were there to execute a search warrant, and he took them up to his residence. One of the officers, with Mr. Berger's consent, accompanied him inside the house to explain to Mrs. Berger what the officers were doing there. Pet. App. 6a.

Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew accompanied them and recorded their conduct as they went about executing the warrant. The media crew, however, did not actively participate with the officers in a search for evidence. Pet. App. 36a. The

evidence gathered by the law enforcement officers later served as a basis for the federal prosecution of Mr. Berger. In that proceeding, Mr. Berger filed a motion to suppress, contending that the warrant was defective and the officers lacked probable cause to search the property. The motion to suppress evidence was denied. *Id.* at 7a.

C. The District Court Proceedings.

The Bergers sued petitioners and the media under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging the violation of their constitutional rights. They also appended various other federal and state law claims against the media that are not at issue here. The principal contentions under *Bivens* were that the federal officers violated the Fourth Amendment by permitting the media crew to film their execution of the search warrant, and that the media had acted sufficiently in concert with the officers to be treated as government actors for purposes of this lawsuit. Pet. App. 2a. Petitioners moved to dismiss the *Bivens* claim, or in the alternative for summary judgment, raising the defense of qualified immunity.

The District Court treated the motion as one for summary judgment, and upheld the defense of qualified immunity. The court began by recognizing, correctly, that the plaintiffs bore "the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act," which requires a survey of the legal landscape "as it existed at the time of the conduct in question." Pet. App. 31a. The court stated that it would begin with binding Supreme Court or Ninth Circuit precedent, and in its absence would proceed to consider all available decisional law that preceded the actions in question. *Id.*

The court concluded that there was *no* authority -- binding or otherwise -- holding that petitioners' conduct violated the Fourth Amendment at the time that they had acted. Based on this conclusion, in a trenchant recitation of the controlling law in this area, the court held that the defense of qualified immunity was proper:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.
>
> No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

Pet. App. 34a (citing, *inter alia*, *Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980)).

The court went on to hold that the Bergers were collaterally estopped from relitigating the reasonableness of the search because those same issues had been decided adversely to Mr. Berger in his criminal trial. Pet. App. 39a-40a. It also held that the media had not become government actors for purposes of *Bivens* liability. *Id.*

D. The Decision by the Court of Appeals.

On each of these points, the Ninth Circuit reversed. On the issue of qualified immunity, in particular, the court cited with approval the Second Circuit's decision in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), which "held that even though there was then no reported decision expressly forbidding agents from inviting the press into

the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a. The court went on, however, to alter the normal approach in determining whether the law was clearly established at the time by stating:

> We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

Id. at 11a-12a.

In the ensuing passage, the court half-heartedly sought to distinguish the contrary holdings on qualified immunity reached by the Eighth Circuit in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), and by the Fourth Circuit in *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *aff'd*, Nos. 96-1185 & 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc), without squarely addressing the conflicting analysis undertaken in either of those decisions. Pet. App. 12a. The court also tried unpersuasively to distinguish the prior cases to the contrary that the District Court had relied on to uphold the defense of qualified immunity, opining that in each of those cases "the media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." *Id.* at 13a (citing *Moncrief*, *Higbee*, and *Prahl*).

The Ninth Circuit also held that collateral estoppel did not apply in this case, and that the media must be considered to have acted jointly with the federal officers and thus "under color of law." Pet. App. 3a. (Petitioner does not challenge either of these latter holdings here, but contests only the issue of qualified immunity.) A timely petition for rehearing was denied, *see id.* at 48a, and this petition for *certiorari* followed.

REASONS FOR GRANTING THE WRIT

This petition raises an issue that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: when there is no binding authority from the Supreme Court or the Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question so as to invalidate a defense of qualified immunity, what weight (if any) is to be given to the decisions of other courts on the specific issue at stake? In particular, where other courts had held that essentially the same conduct was *lawful* at the time, is it proper for a court to reject a defense of qualified immunity and can such a ruling be squared with the Court's precedents? Petitioner suggests that the correct answer is clearly in the negative, and that the Court's precedents directly mandate a summary reversal in this case on the issue of qualified immunity.

In addition, the lower courts are now squarely divided on the precise issue posed in this case: whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. The Ninth Circuit has sided with the Second Circuit, against the Eighth and Fourth Circuits, by rejecting the defense of qualified immunity raised by petitioners here. This growing circuit split is tremendously significant for law enforcement officials, whose functions and duties are enhanced by ensuring that their actions are reported to the public accurately and pervasively. Moreover, the chill that would be cast upon all law enforcement activity by requiring these officials to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages is intolerable and cannot be reconciled with the purposes of qualified immunity.

I. THE NINTH CIRCUIT BROKE WITH COURT PRECEDENT BY HOLDING THAT OFFICERS VIOLATED CLEARLY ESTABLISHED LAW AT A TIME WHEN NO CONTROLLING DECISIONS SO HELD AND EVERY COURT TO RULE ON THIS CONDUCT HAD FOUND IT LAWFUL.

The ruling below departs radically from the doctrine of qualified immunity that the Court has extended to state and local officials. The Court has settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The core issue in this case, which demands consistent treatment in the lower courts, is which sources of law may bear upon this determination when no controlling authority from the Supreme Court or the relevant lower court of last resort has addressed the specific legal issue at stake.

Instead of applying the governing principles laid down by this Court, the court below turned the traditional qualified immunity inquiry upside-down. In rejecting the defense raised by petitioners in this case, the Ninth Circuit purported to find "even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of" such conduct. Pet. App. 11a-12a. That observation, however, is entirely irrelevant to the proper legal analysis. The District Court already had correctly discredited this argument when plaintiffs put it forward on the motion for summary judgment:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

Pet. App. 34a.

In fact, at the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. Even more to the point, the only lower courts that had addressed these same circumstances had upheld the lawfulness of such conduct. *See Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). *See also Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984) (holding that such conduct does not infringe any fundamental right triggering more exacting equal protection scrutiny). In this posture, the Ninth Circuit could not legitimately invalidate the defense of qualified immunity.

Indeed, on the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), the ruling below should be summarily reversed. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See Mitchell*, 472 U.S. at 533 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472

F.2d 340 (7th Cir. 1972); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972)). Accepting the federal officials' defense of qualified immunity, the Court held that in light of these two unpublished decisions, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," and thus he was entitled to qualified immunity. *Id.*

Summary reversal in this case would strongly reaffirm the Court's previous admonition that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). Indeed, the Court recently used the mechanism of summary reversal to overturn another flawed Ninth Circuit ruling on qualified immunity, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). The importance of close adherence to these principles in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial," is manifest. *Mitchell*, 472 U.S. at 526 (emphasis in original). The same disposition is even more clearly justified in this case, where the result is dictated by the Court's controlling precedent in the *Mitchell* case.

The difficulty that the Ninth Circuit experienced in this case, and that other lower courts encounter from time to time, is what should be done in instances where no controlling authority from the Supreme Court or the pertinent Court of Appeals has fairly addressed the specific legal issue underlying the claimed defense of qualified immunity. In *Harlow*, the Court expressly declined to decide when and in what circumstances lower court case law can resolve the central question of whether the law was "clearly established" one way or the other. *See id.*,

457 U.S. at 818 n.32. Some courts have held that the absence of clear authority from these sources of controlling precedent is itself decisive in favor of qualified immunity. *See, e.g., Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3704 (Apr. 27, 1998); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, 118 S. Ct. 412 (1997). Others, such as the court below in this case, view this situation as a broad license to cast about for more tangential analogies to more generalized precedents. *See* Pet. App. 10a-11a. A more restrained approach, as put forth by petitioners here, would be to look to other lower courts that have fairly addressed the specific actions at issue and to consider whether those precedents indicate any clear trend in the law demonstrating the patent unlawfulness of that conduct. *See, e.g., Bartlett v. Fisher*, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test."). But particularly where -- as here and as in *Mitchell* -- there is no controlling authority that clearly establishes the law one way or the other, and the apparent tenor of other court decisions confirms that the law was at least unsettled, or indeed was settled in favor of the lawfulness of such conduct, this landscape should be the decisive factor which requires the defense of qualified immunity to be upheld.[2]

---

[2] Commentators have noted the lack of definitive guidance from the Court on this issue. *See, e.g.*, James Flynn Mozingo, *The Confounding Prong of the* Harlow v. Fitzgerald *Qualified Immunity Test: When Is a Constitutional Right Clearly Established?*, 17 AM. J. TRIAL ADVOC. 797, 806 (1994) (Supreme Court's "shortcomings" in failing to define "clearly established" law include its failure to "acknowledge whether opposite or inconsistent rulings between the district courts, or likewise a division among the circuit courts, can prevent a law from being 'clearly established,' thereby mandating a judgment for immunity"); Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 627 (1993) ("lower courts have had to struggle with the 'where to look' problem when resolving qualified immunity disputes"

Here the District Court analyzed the issue in these terms, but the Ninth Circuit failed to do so. *Compare* Pet. App. 34a *with id.* at 11a-12a. The reviewing court's error is only magnified by the fact that one of the decisions that was cited on point (*Higbee*) was rendered by a District Court located within the Ninth Circuit itself. Even were this not so, the Ninth Circuit's determination to ignore two unpublished federal rulings and one intermediate state-court decision to the contrary clashes directly with the holding and approach adopted by this Court in *Mitchell*. This failure to come to grips with lower court precedents from other jurisdictions that had upheld the lawfulness of such conduct is also flatly inconsistent with this Court's approach in *Procunier*, 434 U.S. at 563-65 & nn.8-10, which considered decisions from other jurisdictions in concluding that the law was not "clearly established" against the public officials who had been sued in that case. *See also Elder v. Holloway*, 510 U.S. 510, 516 (1994) ("court engaging in review of a qualified immunity judgment should therefore use its 'full knowledge of its own [and other relevant] precedents'") (citation omitted; brackets in original).[3]

---

and "have not been uniform in their approaches to the issue"); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1751 (1991) (ten years after *Harlow*, the question of where to look for clearly established law "remains unresolved"); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605 n.41 (1989) (the Supreme Court has not answered "whether the case law clearly establishing the constitutional right must come from the jurisdiction in which the defendant works, or whether cases from other jurisdictions are also relevant").

[3] *See also* Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 145 (1991) ("Most courts of appeals conclude that a constitutional right is not clearly established if the relevant cases in the defendant's own jurisdiction or in other jurisdictions are conflicting.") (footnotes omitted).

Nor may a court in this situation saddle public officials with personal liability in money damages merely because the court is adamantly persuaded that its own legal judgments should have been obvious on their face to everyone. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341. In this case, moreover, the underlying Fourth Amendment issues plainly are not obvious, even today, to many of the federal and state judges who are vested with the authority to address them. *See Parker v. Boyer*, 93 F.3d 445, 448 (8th Cir. 1996) (alleged constitutional violation based on media accompanying officers to observe and report on their conduct is not "self-evident"), *cert. denied*, 117 S. Ct. 1081 (1997); *Wilson v. Layne*, Nos. 96-1185 & 96-1188, 1998 WL 159673, at *4 (4th Cir. Apr. 8, 1998) (en banc) ("reasonable jurists can differ on this question").

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their responsibilities with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). It is only by faithful application of the settled principles established by this Court that law enforcement officers can "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Without steady application of these principles, officers will be subjected to "undue interference with their duties" and "potentially disabling threats of liability." *Elder*, 510 U.S. at 514. Summary reversal is therefore warranted in this case, and will serve the useful purpose for sound judicial administration of reasserting this Court's authority to superintend the lower courts in ensuring strict fidelity to the important doctrine of qualified immunity.

II. THE CIRCUITS ARE SPLIT ON WHETHER OFFICERS VIOLATE CLEARLY ESTABLISHED LAW BY ALLOWING THE NEWS MEDIA TO ACCOMPANY THEM AND REPORT ON THE EXECUTION OF A VALID WARRANT.

The circuit courts of appeals are also divided on the specific constitutional issue that underlies the defense of qualified immunity raised in this case: whether it violates clearly established law for law enforcement officers to allow members of the news media to accompany them in order to observe and report on their conduct as they properly execute a valid warrant on private property.

Like the District Court here, the Eighth Circuit has upheld qualified immunity for law enforcement officers who allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. In reversing the District Court, the Ninth Circuit rejected these decisions and sided instead with the Second Circuit, which denied qualified immunity in the same situation. Subsequent to the ruling below in this case, the Fourth Circuit has issued an *en banc* decision upholding qualified immunity in the same circumstances, agreeing with the Eighth Circuit's approach and disagreeing with the decision below and the previous holding by the Second Circuit. If the Court does not summarily reverse, therefore, it should grant *certiorari* to resolve the clear circuit conflict presented on this underlying issue.

In *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), the Second Circuit held that it has long been clearly established, at least since the outset of the American republic, that such conduct would violate the Fourth Amendment. In *Ayeni*, federal agents from the Secret Service executed a search warrant in the plaintiffs' home. The agents were accompanied by members of a CBS television news crew, who did not assist in the search, but videotaped the officers' actions in executing the search warrant. The Second Circuit held that this conduct violated the Fourth Amendment and that the federal officers were not entitled to qualified immunity, even

though no court ruling had ever addressed or disapproved of such conduct:

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant . . . [The Secret Service agent] exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there.

Id. at 686.

The Second Circuit's approach has been soundly criticized by the Sixth Circuit, which noted that "*Ayeni* may be distinguished by the court's failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms." *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995). This criticism more faithfully reflects the Court's own precedents governing the application of qualified immunity than does the very general analysis employed in *Ayeni*. In *Anderson*, the Court noted that operation of the qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at a vague level of generality thus would eviscerate the

important protections that the Court affords through the doctrine of qualified immunity. *Id.* The District Court understood these lessons and applied them correctly in this case, *see* Pet. App. 30a-31a, whereas the Ninth Circuit did not.

In contrast, the Eighth Circuit Court of Appeals has held that even in February 1994 it was not clearly established that such conduct violated the Fourth Amendment. *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997). The court recognized that the only court rulings on point at that time were *Higbee*, *Moncrief*, *Prahl*, and *Avenson*, and that each had upheld the lawfulness of the officer's actions. "In assessing claims of qualified immunity, we are of course required to examine the state of the relevant law at the time the officials committed the torts of which the plaintiffs complain." *Id.* at 447 (citing *Harlow*, 457 U.S. at 818-19, and *Mitchell*, 472 U.S. at 530). The Eighth Circuit then dismissed the relevance of *Ayeni*, pointing out that because the Second Circuit's decision was not rendered until "after the police in this case executed their search, [it] cannot weigh in the balance against a finding of qualified immunity." *Id.*

Yet the Eighth Circuit also rejected the Second Circuit's position more pointedly. In *Ayeni*, the court had ruled that the law was *always* clearly established that to allow members of the news media to accompany, observe, and report on the conduct of officers properly executing a valid warrant would violate Fourth Amendment. *See Ayeni*, 35 F.3d at 686. The Eighth Circuit explicitly considered and rejected this broad declaration about the state of the governing law, which it found to be mixed at best:

> Even if we believed that [*Ayeni* was] entitled to consideration, [it] would appear to us to indicate at most only the beginnings of a trend in the law. Nor do we think it self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant.

Parker, 93 F.3d at 447. For this reason, the Eighth Circuit

parted ways with *Ayeni*: "Accordingly, we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional principle of which the police, at the time they executed their search warrant, should have been aware." *Id.*

In ruling on the qualified immunity issue in this case, the court below rejected *Parker* and embraced *Ayeni*, concluding that "even though there was then no reported decision expressly forbidding agents from inviting the press" to accompany them and observe and record their execution of a warrant, "no reasonable officer could have thought it permissible." Pet. App. 11a (citing *Ayeni*, 35 F.3d at 686). The court below barely acknowledged the contrary holding in *Parker*, which it purported to distinguish without providing any supporting rationale for the supposed distinction. The court also virtually ignored the Fourth Circuit's panel decision in *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), which the full court, sitting *en banc*, has now reaffirmed. *See* Pet. App. 12a. It did not seriously address the prior precedents of *Higbee*, *Moncrief*, and *Prahl*, which it recognized had "upheld the constitutionality of searches or arrests where the police invited the media to ride along and record or photograph the law enforcement activity," even though *Higbee* was a decision by a district court within the Ninth Circuit. Pet. App. 12a. Instead, the court below brushed aside these contrary decisions by briskly declaring -- with no supporting legal or factual authority -- that there had been greater cooperation between the officers and the media in this case than in those three situations. *See id.*

The Fourth Circuit has now further deepened this circuit split. Before the decision below was rendered, a Fourth Circuit panel had ruled that it was not clearly established in April 1992 that such conduct violated the Fourth Amendment. *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997). That ruling was later vacated when the full court granted *en banc* review. Subsequent to the decision below in this case, the Fourth Circuit rendered a 6-5 decision upholding the law enforcement officers' claim of qualified immunity. *Wilson v. Layne*, Nos. 96-1185 & 96-1188, 1998 WL 159673 (4th Cir. Apr. 8, 1998) (en banc).

The court agreed with the Eighth Circuit's holding in *Parker*, and relied upon the earlier decisions in *Moncrief*, *Higbee*, and *Prahl*. *Id.* at *4. It was not persuaded by the contrary holdings in this case and *Ayeni*, succinctly noting that because "reasonable jurists can differ on this question, we cannot say that the law was so clear that a reasonable officer must have known his actions transgressed constitutional bounds." *Id.* The dissenting judges, of course, took precisely the opposite view about the rectitude of these competing precedents. *Id.* at *12 (Murnaghan, J., dissenting).[4]

The indubitable result of these decisions is a direct and irreconcilable conflict, which will prove dispositive on the very same claims when they are brought in different courts in different parts of the country. The Second Circuit has held that law enforcement officers have *always* violated clearly established law if they allow members of the news media to accompany them in order to observe and report on their conduct in properly executing a valid warrant because this activity is so plainly and egregiously unconstitutional. *Ayeni*, 35 F.3d at 686. The Eighth Circuit has held that it is not "self-evident" that this activity violates the Fourth Amendment, that "at most" there is "only the beginnings of a trend in the law" to this effect, and that officers were thus entitled to qualified immunity when they engaged in this activity in February 1994. *Parker*, 93 F.3d at 447. In this case, the Ninth Circuit has expressly aligned itself with *Ayeni* by holding that "a residential search videotaped by commercial television crews was unreasonable, and the officers unprotected by qualified immunity." Pet. App. 13a. Even though no cases had expressly said so when these officers engaged in such activity in March 1993, the court agreed with *Ayeni* that such conduct had always been understood to violate

[4] The dissent observed that "[t]he majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough." *Wilson*, 1998 WL 159673, at *21 (Murnaghan, J., dissenting).

clearly established law. *Id.* Since the ruling below, the Fourth Circuit has explicitly rejected its conclusions and sided instead with the Eighth Circuit by holding that officers were entitled to qualified immunity for allowing media to accompany them and report on their conduct in April 1992. *See Wilson*, 1998 WL 159673, at *6. It cannot be denied, therefore, that law enforcement officers and potential plaintiffs throughout the country will continue to have their legal claims resolved inconsistently without some manner of intervention by this Court.

The intersection of the qualified immunity issue with the underlying Fourth Amendment issue makes this case of exceptional importance. In the many states and localities encompassed by the Ninth and Second Circuits, their holdings will effectively require law enforcement officers to execute warrants in secret, upon pain of incurring personal liability for monetary damages. The resulting closed regime of law enforcement operations would disserve, rather than advance, the fundamental constitutional interests that the Fourth Amendment is designed to protect.[5]

Finally, the regime of qualified immunity laid down by these two courts is untenably strict. At present, notable judges of the various lower federal courts remain in sharp disagreement over the merits of the underlying constitutional issues applying the Fourth Amendment. Yet law enforcement officers in the Second and Ninth Circuits are being held personally liable for having to make guesses in gray areas of the law, and not simply for transgressing bright lines. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In the circumstances at issue in

[5] Indeed, in *Wilson*, the Fourth Circuit stated that it is in fact "a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because *both* the deterrence of crime *and* the deterrence of improper conduct by law-enforcement officers are vital to the broader mission." *Wilson*, 1998 WL 159673, at *5 (quotations omitted).

this case, petitioners cannot plausibly be placed in either category. This Court has repeatedly warned the lower courts that public officials are not required and "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562; *see also id.* at 563-65 & nn.8-10. Either summary reversal or a grant of *certiorari* is necessary in this case to reinforce that ostensibly clear message to the lower courts once again.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed in this case. In the alternative, the petition for a writ of *certiorari* should be granted and the case set for plenary review on the merits of the qualified immunity issue.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioner

May 1998

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA, *Defendants-Appellees*.	) No. 96-35251) DC No. CV-95-) 00046-JDS	
PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation, *Defendants-Appellees*.	) No. 96-35266) DC No. CV-94-) 00046-JDS) OPINION	

Appeals from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Argued and Submitted
September 19, 1996--Seattle, Washington
Filed November 13, 1997

Before: Mary M. Schroeder and Andrew J. Kleinfeld, Circuit Judges, and Rudi M. Brewster,* District Judge.

OPINION

SCHROEDER, Circuit Judge:

When federal agents searched the ranch of Paul and Erma Berger in March of 1993, they acted not only pursuant to a search warrant, but also pursuant to a written contract with appellees Cable News Network and Turner Broadcasting System, authorizing the filming and recording of the search for broadcast on their environmental television shows "Earth Matters" and "Network Earth." The media wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity.

After Mr. Berger was convicted of one misdemeanor count for using a pesticide in a manner inconsistent with its labeling, 7 U.S.C. § 136j(a)(2)(G), and acquitted of three felony counts of the killing of at least one eagle, the Bergers sued both the media and the federal agents under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for the violation of their constitutional rights. The Bergers also sued the media for the violation of the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.*, for various state law torts, and to enjoin further broadcasts of the video shot at their ranch. The Bergers' principal contentions under federal law are that (1) the federal agents violated their Fourth Amendment rights by permitting commercial television cameras to film the search and by assisting the media in their search for dramatic material, and (2) the media acted sufficiently in concert with the

---

* Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

federal agents to be held accountable for that violation as government actors.

On the *Bivens* action, the district court ruled that the federal agents were entitled to qualified immunity because there was, at the time of this episode, no clearly established law protecting individuals from the commercial recording of a search of their residences. The court also held that the Bergers were collaterally estopped from litigating the reasonableness of the search because the same issues had been decided adversely to Mr. Berger in his criminal trial. In addition, the court rejected the Bergers' claim that the media had become government actors for purposes of *Bivens* liability.

We reverse the judgment in favor of the federal appellees on the Fourth Amendment claim because we hold the federal officers are not entitled to qualified immunity in this case. Because we hold that the issues litigated in the criminal proceeding were not the same as the issues presented to the district court in this civil suit, we also reverse the district court's ruling that this action is barred. The judgment in favor of the media on the *Bivens* claim is reversed because, on the basis of the present record, we must consider the media to have acted jointly with the federal appellees, and hence "under color of law." We affirm the district court's ruling that the media are not liable under the Federal Wiretap Act, however.

On the state law claims, we reverse the court's ruling in favor of the media on the trespass and infliction of emotional distress causes of action. We affirm the ruling on the conversion claim, and decline to enjoin further broadcasts.

In reviewing the grant of summary judgment to the appellees, we view the evidence in the light most favorable to the Bergers. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996).

FACTS AND PROCEDURAL BACKGROUND

Paul and Erma Berger reside on a 75,000 acre ranch in Montana. At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. In January of 1993, former employees of the Bergers apparently went to the United States Fish and Wildlife Service ("USFWS") and told USFWS agents that they had seen Mr. Berger poison or shoot eagles a few years earlier. Upon hearing about that investigation, the media appellees, Cable News Network, Inc. and CNN employee Jack Hamann, together with Turner Broadcasting System, Inc. and TBS employees Robert Rainey and Donald Hooper, approached agents of USFWS to see if a television deal could be worked out. The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime. On March 11, 1993, approximately two weeks before the search was executed, the Assistant U.S. Attorney in charge of Mr. Berger's investigation, federal-appellee Kris McLean, and media correspondent Jack Hamann, executed the following letter agreement on CNN letterhead:

> Dear Mr. McLean:
>
> This confirms our agreement that the United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS Agents as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993. Except as provided below, CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage; and does not waive any rights or privileges it may have with respect to the footage.
>
> In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until

> either: (1) a jury has been empaneled and instructed by a judge not to view television reports about the case; or (2) the defendant waives his right to a jury trial and agrees to have his case tried before a judge; or (3) a judge accepts a plea bargain; or (4) the government decides not to bring charges relating to the attempt to execute the search warrant.
>
> Please acknowledge your agreement to the foregoing by executing the signature line below.
>
> Sincerely, Jack Hamann, Correspondent, CNN Environmental Unit.
>
> Acknowledged signature of Kris McLean, Assistant United States Attorney for the District of Montana, Helena, Montana.
>
> cc: Jennifer Falk Weiss, CNN Legal Department.
> Chet Burgess, CNN Environmental Unit.

On March 18, a magistrate judge issued a search warrant for the Bergers' ranch, authorizing the search of the ranch and appurtenant structures, excluding the residence, for evidence indicating the taking of wildlife. According to the Bergers, the magistrate judge had no knowledge of the planned media participation during the search, and there is no contention by the appellees that when the magistrate judge issued the warrant, he approved the videotaping of the search for broadcast purposes.

According to the Bergers, the media participated in a pre-search briefing the day before the search, at which the federal appellees shared with the media details of the material included in the warrant and supporting materials that were supposed to remain under seal until after the search.

On the morning of the search, the government team, accompanied by a media crew, gathered on a county road leading to the ranch, to discuss the execution of the warrant. The cameras videotaped that gathering. The broadcast team then proceeded with the federal agents and AUSA McLean in a caravan of approximately ten vehicles to a point near the Bergers' ranch. Media cameras mounted on the outside of government vehicles, or placed in their interior, documented every move made by the federal appellees. At all times during and immediately prior to the search, USFWS Special Agent Joel Scrafford was wired with a hidden CNN microphone which was continuously transmitting live audio to the CNN technical crew.

Mr. Berger approached and met the caravan in a pickup truck on the road leading up to the ranch. Agent Scrafford proceeded to inform Mr. Berger of the search warrant, and asked him whether he could ride to the house in Mr. Berger's truck so that he could explain to Mrs. Berger what they were going to do. Mr. Berger allowed Agent Scrafford to ride with him in the pickup truck. Upon arriving at the Bergers' residence, the two men entered the house together. Audio recorded at the site indicates that Mr. Berger consented to Agent Scrafford's entry into the home at this time. The parties disagree on whether the agents who entered the residence with Agent Scrafford searched the residence for incriminating evidence, and whether Agent Scrafford's subsequent entries into the home were consented to. However, it is undisputed that Agent Scrafford recorded all his conversations with the Bergers inside the house.

The Bergers were not informed that Agent Scrafford was wearing a microphone or that the cameras that were visible during the search belonged to the media. The media recorded more than eight hours of tape and it broadcast both the video footage and the sound recordings made in the house.

Mr. Berger was tried on an amended information charging him with the taking of at least one golden eagle, in violation of 16 U.S.C. § 668(a); the killing of one ferruginous hawk, and one ring-billed gull, in violation of 16 U.S.C. §§ 703 and 707(a); the taking of at least one bald eagle in violation of 16 U.S.C. § 1538(a)(1)(B) and 16 U.S.C. § 1540(b)(1); and the use of a registered pesticide, Furadan, in a manner inconsistent with its labeling. The charge was that Mr. Berger applied Furadan to sheep carcasses with the intent of killing predators, including eagles, in violation of 7 U.S.C. §§ 136j(a)(2)(G).

Before trial, the magistrate judge denied a defense motion to suppress evidence on the grounds that the agents lacked probable cause to search and that the warrant did not accurately describe the property to be searched. Mr. Berger was acquitted of all charges, except the misdemeanor charge of using Furadan contrary to its labeling.

The Bergers filed two actions in 1995, which proceeded on identical courses. The district court entered a final judgment in favor of all the appellees in both cases in February 1996, and these parallel timely appeals followed.

COLLATERAL ESTOPPEL

The district court ruled that because issues concerning the constitutionality of the search have already been litigated in Mr. Berger's criminal case, this action was barred by collateral estoppel. The court relied on *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 762 (9th Cir. 1991), which holds that a plaintiff is estopped from bringing a civil action to challenge an issue which was " 'distinctly put in issue and directly determined' in a previous criminal action", and *Matthews v. Macanas*, 990 F.2d 467, 468 (9th Cir. 1993), which affirmed the dismissal of a *Bivens* action based on the preclusive effect of a Fourth Amendment ruling in a previous criminal action.

The difficulty with the district court's reasoning is that a party is generally estopped or precluded from litigating only those issues that have previously been decided. *See Allen v. City of Los Angeles*, 92 F.3d 842, 849 (9th Cir. 1996); Restatement (Second) of Judgments § 27. Collateral estoppel can thus be used in a civil action to bar relitigation of issues decided in a prior criminal proceeding, but, as *Bagley* recognized, a party may only be estopped from bringing a civil action to challenge a particular issue if that issue was " 'distinctly put in issue and directly determined' in a previous criminal action." *Bagley*, 923 F.2d at 762 (quotation omitted).

Because the magistrate judge in the criminal case was not presented with the specific issues raised in this action, the district court erred in holding that the Bergers' *Bivens* action was barred. In the *Bivens* claim, the Bergers are concerned with whether the search was unreasonable because of the media's involvement in the search.

In his motion to suppress in the criminal case, on the other hand, Mr. Berger challenged the validity of the warrant itself. He contended that (1) it failed to establish probable cause because it contained no facts indicating either the veracity of the informants, or independent law enforcement investigation to corroborate the information given by the informants; (2) the search warrant was stale; and (3) the property designated in the search warrant was improperly described.

The magistrate judge's rulings directly responded to these, and only these arguments. He agreed with the government that (1) the veracity of the informants could be presumed and that no corroboration was required; (2) the facts set forth in the affidavit indicated that Mr. Berger was engaged in an ongoing pattern of criminal activity, so the evidence was not stale, and (3) although the description of the real estate in the warrant was "grossly excessive and inaccurate," the defect did not rise to such a level

as to "offend[ ] the Constitution."

This case is thus fundamentally different from *Matthews*, on which the district court relied. In *Matthews*, the plaintiff incorporated by reference in his *Bivens* brief the same Fourth Amendment arguments he had presented in his criminal appeal, i.e., that the affidavit submitted in support of the search warrant would not have established probable cause had the affiant not misled the issuing court. Because a panel of this court had already held in Matthews' criminal appeal that the affidavit did establish probable cause, the panel reviewing Matthews' *Bivens* action correctly deemed the civil action barred by collateral estoppel. *Matthews*, 990 F.2d at 466. By contrast, the arguments and issues raised in the motion to suppress in this case were not the same as the arguments and issues raised in the Bergers' *Bivens* action, and therefore, collateral estoppel does not bar this civil suit.

THE BIVENS CLAIM

1. *The violation of the Fourth Amendment and immunity*

The Bergers claim that the federal appellees, AUSA Kris McLean and USFWS Special Agents Rodney C. Hanlon, Joel Scrafford, Richard C. Branzell and Robert Prieksat, are individually liable for damages caused by their active participation in the commercial television/law enforcement enterprise conducted at the Bergers' ranch. The Bergers contend that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. We hold they are correct and that the federal officials are not entitled to qualified immunity.

This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media

obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose. The Fourth Amendment to our Constitution protects against unreasonable searches and warrants that are obtained under false pretenses:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. We must heed its strictures on the potential abuse of law enforcement powers. This search violated its protections.

Regardless of whether a constitutional violation has occurred, the federal appellees are, of course, entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982); *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1285 (9th Cir. 1996). The federal appellees contend that even if the search was unconstitutional, they could have reasonably believed their conduct was lawful.

The Second Circuit has held that qualified immunity does not protect federal officers in a case where a Secret Service agent invited a TV news magazine into a private home to

videotape a search. *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994). *Ayeni* affirmed District Judge Weinstein's decision in *Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994). The Second Circuit held that even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible. This was in part because of a federal statute prohibiting any persons, other than law enforcement personnel and those assisting them from executing search warrants, 18 U.S.C. § 3105. It was in major part because the publicity purpose would "magnify needlessly the impairment of their right of privacy." *Id.* at 686.

Similarly, the Fourth Circuit has held that where the federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity. *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995). Though noting *Ayeni* with approval, the Fourth Circuit said "[w]e would so hold even if there were no reported authority directly on point," *id.* at 356, because the historical foundations of the Fourth Amendment and the statute discussed above so plainly showed that "[t]he right to be free from government officials facilitating a private person's general search" was "'manifestly included' within the 'core' Fourth Amendment protection." *Id.* at 357. *See also Anderson v. WROC-TV*, 441 N.Y.2d 220, 226 (1981) (stating in a case in which the media was sued for trespass, that "[i]f the media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so this would be nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists.").

We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of

a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant. The cases on which the federal agents rely do not hold such searches are constitutional. In *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996), the Sixth Circuit held that police were justified in permitting a television crew to be present when the warrant itself expressly authorized photography and videotaping. In *Parker v. Bayer*, [sic] 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), a majority held officers had immunity in permitting a television crew to be inside a house during a search, but one member of the panel, Judge Rosenbaum, wrote separately to state that in his view the Fourth Amendment had been violated. Another, Judge Richard Arnold, wrote that in his view the media defendants were joint actors with the police in allegedly violating constitutional rights. *See id.* at 448-49. In *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *vacated* July 30, 1997, a majority of the panel held that the police had qualified immunity when they permitted newspaper reporters and photographers to accompany them while searching a house, but specifically refused to decide the issue of the reasonableness of the search. The dissenting member of the *Wilson* panel, Judge Russell, would have denied immunity and held the conduct patently unreasonable. The entire court has now reheard the case en banc.

In none of these cases did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case. The defendants rely on a trio of older, lower court decisions that upheld the constitutionality of searches or arrests where the police invited the media to ride along and record or photograph the law enforcement activity. *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1621-22 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372, 2372-73 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768, 774

(Wis. Ct. App. 1980). In those cases, however, the media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here. Indeed we have already recognized the differences between videotaping searches for law enforcement purposes and for entertainment. *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996) (as amended on denial of rehearing Feb. 26, 1997, petition for cert. filed May 27, 1997). We there noted that our court and others have assumed without deciding that videotaping for law enforcement purposes does not render a search unreasonable, *see id.* at 1032 n.37, but recognized that a different result might be required if the recording were for other purposes. We cited the Second Circuit's decision in *Ayeni*, that squarely held a residential search videotaped by commercial television cameras was unreasonable, and the officers unprotected by qualified immunity. We reach the same legal conclusions in this case.

2. *The Open Fields Doctrine*

The appellees also claim that they could have violated no privacy interests in videotaping the shed and other outbuildings on the ranch, because their cameras shot footage only from the open fields or of structures in which the Bergers had no expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 360-61, 88 S. Ct. 507, 516-17 (1967) (the Fourth Amendment is not triggered unless the government intrudes into an area in which there is a constitutionally protected reasonable expectation of privacy).

Because the Fourth Amendment speaks only to "persons, houses, papers, and effects," an individual cannot claim a constitutional violation on account of law enforcement officers' warrantless searches of their "open fields." *Hester v. United States*, 265 U.S. 57, 59, 44 S. Ct. 445, 446 (1924) (Holmes, J.);

and see United States v. Dunn, 480 U.S. 294, 107 S. Ct. 1134 (1987); *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735 (1984); *United States v. Van Damme*, 48 F.3d 461, 464-65 (9th Cir. 1995).

This argument misses the mark in this case. The open fields doctrine is not a license for the police to bring trespassers on to private property. It allows law enforcement officers to obtain evidence while on privately owned open fields. It would thus entitle the officers to prevail if the Bergers were suing them for a warrantless search of open fields for evidence of criminal activity. It does not immunize the officers from liability for conduct that has no law enforcement purpose.

Moreover, there is evidence in the record that the shed and other outbuildings that were a focus of the cameras were places in which the Bergers did have a reasonable expectation of privacy, in that they were located close to the house and guarded by a dog. The officers would not have reasonably believed the search of the outbuilding involved open fields for which no warrant was required, much less that the open fields doctrine authorized third parties to trespass.

3. *The Invited Informer Doctrine*

Throughout the execution of the search warrant, Agent Scrafford wore a microphone that transmitted live to the media the conversations between him and the Bergers in their house. The media appellees recognize that the home was outside the scope of the search warrant and that the Bergers did not consent to the microphone's entry into the home. They claim, however, that their surreptitious recording of the Bergers' conversations did not violate the Bergers' Fourth Amendment rights because the Bergers consented to Scrafford's presence and to his being a party to the conversations.

The appellees rely on the "invited informer" or "misplaced confidence" doctrine to support their claim. *See, e.g., United States v. White*, 401 U.S. 745, 91 S. Ct. 1122 (1971); *Hoffa v. United States*, 385 U.S. 293, 87 S. Ct. 408 (1966); *Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424 (1966); *Forster v. County of Santa Barbara*, 896 F.2d 1146, 1147-48 (9th Cir. 1990). The invited informer doctrine was developed in cases where the government placed informers, often with recording devices, to obtain information for legitimate law enforcement purposes. *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989). In *Aguilar*, we held that the invited informer doctrine justifies the use of undercover agents and informers, as long as their use is part of a good faith government investigation. *See also Reporters Committee v. American Telephone & Telegraph*, 593 F.2d 1030, 1043 (D.C. Cir. 1978) ("once [people] project[ ] [their] activities beyond [their] private enclave, the Government is free to scrutinize them for law enforcement purpose"). The invited informer doctrine is thus rooted in the principle that privacy interests must give way to legitimate government scrutiny when a communication is voluntarily made to a third party. Our court in *Aguilar* made this rationale clear when it explained that:

> In approving this investigative technique, the Supreme Court unmistakably declared that persons have no expectation of privacy or confidentiality in their conversations and relations with other persons, no matter how secretive the setting. The Court has recognized that legitimate law enforcement interests require persons to take the risk that those with whom they associate may be government agents.

Aguilar, 883 F.2d at 703.

The invited informer doctrine does not apply in this case, because the surreptitious recording was not done for a

legitimate law enforcement purpose. The recording in this case materially differs from the invited informer cases where the informer was assisting law enforcement. Here, law enforcement authority was used to assist commercial television, not to further law enforcement objectives.

The appellees further contend that the Bergers' conversations must have been "voluntary" because the magistrate judge in the criminal proceeding refused to suppress Mr. Berger's statements for lack of the *Miranda* warnings. Their contention is without merit. The only finding the magistrate judge made was that Mr. Berger had not been placed under the functional equivalent of a formal arrest when he made the statements, so his *Miranda* rights did not attach. *See Berkemer v. McCarthy*, 468 U.S. 420, 440-42, 104 S. Ct. 3139, 3150-52 (1984). He did not rule that Mr. Berger's statements were "voluntary."

The invited informer doctrine thus does not shield the media from liability. We recognized this more than twenty years ago when we held that eavesdropping by the media for public broadcast, even in conjunction with law enforcement, violates important privacy interests. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). *Dietemann* involved the exposing of a quack doctor by media reporters who were cooperating with law enforcement officers. In *Dietemann*, conversations between the reporters and the fraudulent doctor were secretly relayed to law enforcement officers for use in their investigation, and then used in a story published by the media. Like the media appellees here, the media defendants in *Dietemann* attempted to use the "invited informer" doctrine to escape liability. We rejected their defense and explained our decision as follows:

> Plaintiff's den was a sphere from which he could reasonably expect to exclude eavesdropping newsmen. He invited two of defendant's employees to the den.

> One who invites another to his home or office takes a risk that the visitor may not be what he seems, and that the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select. A different ruling could have a most pernicious effect upon the dignity of man. . . .

Dietemann, 449 F.2d at 249.

We therefore hold that the Bergers had an expectation of privacy in their conversations with Agent Scrafford, and that appellees infringed that privacy when they recorded the Bergers' conversations inside the house.

The Media as Government Actors

The final issue we must consider in the Bergers' *Bivens* action is whether the media appellees may be held liable even though they were not agents or employees of the federal government. Ordinarily, *Bivens* liability and the corresponding liability of state actors under 42 U.S.C. § 1983, attaches only to the acts of government officials. *Johnson v. Knowles*, 113 F.3d 1114 (9th Cir. 1997). Private parties may be held liable, however, if they are deemed to have acted "under color of law." *Id.* at 1117 (citing *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983) (owners who obtained pervasive police assistance in evicting tenants were deemed to be joint actors with police)); *Ginn v. Matthews*, 533 F.2d 477 (9th Cir. 1976). *See also Reuber v. United States*, 750 F.2d 1039, 1058 (D.C. Cir. 1984), which held that "private status . . . , even if deemed a special factor, is not alone sufficient to counsel hesitation in implying a damages remedy when the private party defendants jointly

participate with the government to a sufficient extent to be characterized as federal actors. . . ."

In deciding whether conduct of private parties amounts to government action we engage in a highly factual inquiry. *Howerton*, 708 F.2d at 383 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S. Ct. 856, 860 (1961)). Four tests have been developed to facilitate this inquiry. *See Johnson* at 1118-20, where we explained each test. These tests are: (1) the governmental nexus test, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974) (courts must consider whether there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [s]tate itself"); (2) the public function test, *see Jackson*, 419 U.S. at 352, 95 S. Ct. at 454 (state action is present when a private entity exercises functions traditionally and exclusively reserved to the state); (3) the state compulsion test, *see Blum v. Yaretzky*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786 (1982) ("a [s]tate normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [s]tate"); and finally, (4) the joint action test, *see Dennis v. Sparks*, 449 U.S. 24, 27, 101 S. Ct. 183, 186 (1980) (private actors can be considered [government] actors if they are "willful participant[s] in joint action withe the [government] or its agents").

The appropriate test in this case is the joint action test. The Supreme Court has said it is satisfied when the plaintiff is able to establish an agreement, or conspiracy between a government actor and a private party. *See Dennis*, 449 U.S. at 27-28, 101 S. Ct. at 186 (1980) ("Private persons, jointly engaged with [government] officials in the challenged action, are acting 'under color' of law for purposes of [*Bivens*] actions."); *Adickes v.*

S.H. Kress and Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 1605 (1970) ("The involvement of a [government] official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's [constitutional rights], whether or not the actions of the [government official] were officially authorized, or unlawful."); *United States v. Price*, 383 U.S. 787, 794, 86 S. Ct. 1152, 1156 (1966) ("Private persons, jointly engaged with [government] officials in the prohibited action, are acting 'under color' of law for purposes of [*Bivens*]."). Our cases are in accord. *See Howerton, supra*; *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1231 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 746 (1997); *Mathis v. Pacific Gas & Electric Co.*, 75 F.3d 498, 503 (9th Cir. 1996); *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("Joint action therefore requires a substantial degree of cooperative action."). *See also Gorenc v. Salt River Project Agr. Imp. & Power*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Wilmington Parking Authority*, 365 U.S. at 725, 81 S. Ct. at 862, and explaining that joint action may take the form of a "symbiotic relationship" where the government has " 'so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity. . .' ")

In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute -- the execution of a search warrant -- for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet

caring investigators, rather than to further their investigation. This satisfies the joint action test.

At least one distinguished circuit judge has suggested that the media's entry onto searched premises by virtue of government authority would alone be sufficient to constitute joint action. *See Parker*, 93 F.3d at 449 (Richard Arnold, J., dissenting). Judge Arnold noted that "[t]he news crew came to the location with the police and could not have entered if the police had not done so first. They did not simply happen along the street at the time that a search was being conducted." *Id.* Given the record before us, however, we need not go so far. This is because under our own circuit authority, the "inextricable" involvement of the media with both the planning and execution of this search, the government's active involvement with the media's news gathering activities, and the mutually-derived benefits, is more than enough to make the media government actors. *See Gorenc, supra*, quoting *Wilmington Parking Authority*, 869 F.2d 503.

The cases relied on by the district court are unavailing because they involved situations in which the private parties conducted searches on their own, and not under the government's cloak of authority. *See United States v. Miller*, 688 F.2d 652, 657-58 (9th Cir. 1982); *United States v. Jennings*, 653 F.2d 107, 110 (4th Cir. 1981). In *Miller* a theft victim went to the defendant thief's property to look for his stolen trailer. Although a police officer acquiesced in the visit and provided some protection from afar by keeping watch through binoculars while the victim took photographs of his stolen trailer, the officer took no active part in the search. *Miller*, 688 F.2d at 656-58. In *Jennings*, a private party, an airline security manager, searched a package containing drugs, after receiving information from the Drug Enforcement Administration. The court held that notwithstanding the fact that a DEA agent passively observed the search, the search did

not implicate the Fourth Amendment because the private entity independently decided to conduct the search, and acted for its own benefit, rather than as a surrogate for the government. *Jennings*, 653 F.2d at 110-11. While the media here collaborated with the government in order to conduct a search for its own benefit, there was nothing passive about the government's involvement with the media in this case. They acted together.

FEDERAL WIRETAP STATUTE

Next, the Bergers claim that the media appellees violated the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.*, by intercepting for broadcast the Bergers' conversations with Agent Scrafford in the home. The Act is a broad prohibition against warrantless, surreptitious interceptions of wire, oral or electronic communications. 18 U.S.C. § 2511(1)(a)(c).

The Act, however, also contains a broad exception for conversations recorded by persons acting under color of law. That exception provides that:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral or electronic communication, where such person is a party of the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c).

We have held that the media appellees were acting under color of law for purposes of *Bivens* liability. We recognize that the scope of the phrase "under color of law" in the wiretap context is not equivalent to the scope of the phrase in the general section 1983 or *Bivens* context. *See, e.g., Thomas v.*

Pearl, 998 F.2d 447, 450-51 (7th Cir. 1993). *Thomas* held that a basketball coach who was a university employee and who tape-recorded a conversation with an athlete was not acting "under color of law" for purposes of the Federal Wiretap Act. We agree that the "under color of law" exception under the Act was not created to exempt all government employees from liability for recording conversations when only one party has consented: Its core aim must have been to exempt those acting under law enforcement authority. Because both the federal appellees and the media appellees were acting under authority of a search warrant, the exception applies, and because Agent Scrafford, a party to the conversations, consented to the interception, we hold the media appellees not liable under the Federal Wiretap Act.

STATE LAW CLAIMS

Trespass

The Bergers have asserted a claim against the media for trespass. The Bergers allege that the media committed the tort by (1) entering into their home, for which there was no warrant, and (2) by generally being present at the Bergers' ranch during the execution of a search warrant that they contend authorized only the law enforcement officers to enter their property. Trespass is generally premised upon the intentional interference with the property rights of another without consent. *See Ducham v. Tuma*, 877 P.2d 1002, 1005 (Mont. 1994). *Ducham* quoted Restatement (Second) of Torts § 158: "One is subject to liability . . . for trespass, irrespective of whether he thereby causes harm . . . (a) if he intentionally enters land in possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." *Id.* *See also* Restatement (Second) of Torts § 167 (consent is an absolute defense to trespass).

The district court held that the Bergers had no possessory interest in the ranch at the time of the search because the government agents had temporary possession and control of the Bergers' land during the execution of the search. *See, e.g., Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), where the Sixth Circuit explained that where an intrusion is justified, the officers executing the search are "placed in control of the premises." *Bills* recognized, however, that such control does not authorize law enforcement officers to invite third parties on the premises for reasons unrelated to law enforcement. *Id.* The warrant therefore does not justify the media intrusion here, because the officers invited the media for newsgathering, not for law enforcement.

The district court's reasoning is even more problematic insofar as it was applied to the media's entry into the Berger home, a place that the government did not have a warrant to search. Although Mr. Berger consented to Agent Scrafford's initial entry into the home, he never consented to the entry of the media-owned microphone that Agent Scrafford wore. In addition, the media could not have benefitted derivatively from the consent extended to Agent Scrafford, because without a warrant, Agent Scrafford was not in control and possession of the home, and therefore, had no valid authority to supply the requisite consent.

The media's contention that their entry was impliedly consented to by "custom and usage," is also unavailing. *See Florida Pub. Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1977) (implying consent from a longstanding "custom and usage" of permitting the media to enter private property where a conflagration had consumed a house, causing death, and where the Florida Supreme Court characterized the fire as "a disaster of great public interest," and a "calamity"). *Fletcher* involved a disaster, which this case does not. Other courts have similarly

distinguished *Fletcher* on its facts. *See Prahl*, 295 N.W.2d at 779, *WROC-TV*, 44 N.Y.2d at 223.

Although neither the district court nor this court has exhaustively researched Montana trespass law, we have no reason to believe it departs from the generally recognized principles we have discussed. We therefore remand for the district court's further consideration of the Bergers' claim for trespass against the media.

Conversion

The Bergers sued the media appellees for conversion on the basis of the media's capture of their images and voices. The district court found that recorded sounds and images cannot be the subject of a conversion claim. We agree.

To make out a valid conversion claim under Montana law, a plaintiff must prove that (1) he owns the property converted, (2) has a right to its possession, (3) the converter exercised unauthorized dominion over that property, and (4) the property owner has suffered damages as a result of the conversion. *Eatinger v. Johnson*, 887 P.2d 231, 234 (Mont. 1994) (citation omitted). The Bergers' images and sounds are intangible, and intangible property interests have not traditionally been subject to conversion. *See* Prosser & Keeton, Law of Torts § 15 (5th ed. 1985); Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 1.01[B](1)(i) (1995) ("The torts of conversion and trespass relate to interference with tangible rather than intangible property. . . ."). Although the common law rule has been relaxed somewhat, and the tort may now reach the misappropriation of intangible rights customarily merged in or identified with some document, it has not yet been extended further. *See* Restatement (Second) of Torts, § 242 and comments; *Hurst v. Dezer/Reyes Corp.*, 82 F.3d 232, 236 (8th Cir. 1996) (holding that even under the "expanded definition of

the tort" under New York law, the business concept and appearance of a diner could not be "converted" since the claimed property rights were not rights customarily merged in a document); *Zacchini v. Scripps-Howard Broadcasting Co.*, 351 N.E.2d 454, 457 (Ohio 1976) ("it has never been held that one's countenance or image is 'converted' by being photographed"). No Montana court has recognized a cause of action for the "conversion" of sounds and images. The Bergers, therefore, have not stated a claim for conversion.

Intentional Infliction of Emotional Distress

Under Montana law, this cause of action may arise "if there was serious or severe emotional distress to the plaintiff which was a reasonable [sic] foreseeable consequence of the defendant's negligent or intentional act or omission." *See Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 429 (1995).

The district court rejected this claim on the ground that it had already found that none of the media appellees' acts were unlawful, and therefore, emotional distress could not have been a reasonably foreseeable consequence of their actions.

In light of our holding that the Bergers have alleged a claim of interference with both their privacy and their property interests, we also remand this claim to the district court for reconsideration upon a fully developed record.

INJUNCTION

The Bergers also sought an injunction preventing the media appellees from further broadcast of any or all parts of the video and sound gathered during the search. We agree with the district court that this is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." *CBS, Inc. v. Davis*, 510 U.S. 1315, 114 S. Ct. 912,

914 (1994) (Blackmun, Circuit Justice, staying preliminary injunction) (citations omitted). Even though the Bergers have alleged triable claims for damages arising out of the manner in which the media appellees obtained the material, such allegations are not sufficient to support the imposition of an injunction. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publication of the Pentagon Papers).

CONCLUSION

We reverse the district court's judgment in favor of the federal appellees in the Bergers' *Bivens* claim, and also reverse the judgment in favor of the media appellees on that claim. We also reverse and remand the judgment in favor of the media appellees on the Bergers' state law claims for trespass and intentional infliction of emotional distress, but otherwise affirm the judgment of the district court.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART for further proceedings. Costs are awarded to Appellants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PAUL W. BERGER and ERMA R. BERGER,	)	
	)	Cause No. CV-95-46-BLG-JDS
Plaintiffs,	)	
vs.	)	
RODNEY HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. McLEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, **ROBERT RAINEY, DONALD HOOPER,** and **UNITED STATES OF AMERICA,**	)	MEMORANDUM AND ORDER
Defendants.	)	

Pending before this Court is the federal defendants' motion to dismiss or, in the alternative, for summary judgment. The "federal defendants" as referred to in this order are United States Department of Interior's Fish and Wildlife Service (FWS) Special Agents Hanlon, Scrafford, Branzell, and Prieksat, and Assistant United States Attorney (AUSA) McLean. Incorporated in the federal defendants' motion is a request that this Court take judicial notice of the information filed May 5, 1993 in United States v. Paul W. Berger, and of excerpts from testimony given by Special Agent Joel Scrafford in the matter. Also pending is the motion for summary judgment filed by

defendants Turner Broadcasting Systems, Inc. (TBS), Robert Rainey (Rainey), and Donald Hooper (Hooper). Rainey and Hooper were members of the Cable News Network (CNN) camera crew which filmed the execution of the search warrant. After hearing oral arguments and reviewing the briefs, this Court is prepared to rule on the motions.

BACKGROUND

The plaintiffs in this case are Garfield County ranchers Paul W. Berger (Berger) and his wife Erma R. Berger (Mrs. Berger). An investigation was initiated after former employees of Berger contacted Montana Fish and Game Service officials alleging that Berger used poisons to kill predators on his ranch, including eagles. In connection with the investigation of Berger, the FWS obtained a search warrant for the Berger ranch. This action arises from the March 24, 1993 execution of that federal search warrant by FWS agents.

Sometime prior to the execution of the warrant, CNN was given permission to accompany the government while agents executed the search warrant. The CNN crew accompanied federal and state agents during the execution of the search warrant. CNN later broadcast a news story about ranchers killing predators. The investigation and prosecution of Berger were featured in the story. On March 21, 1995, this lawsuit was filed. The Bergers allege that in executing the search warrant, federal defendants and defendants TBS, Rainey, and Hooper violated their Fourth Amendment right to be free from unreasonable searches and seizures. Additionally, the Bergers allege trespass against TBS, Rainey, Hooper and AUSA McLean; conversion against TBS, Rainey, and Hooper; intentional infliction of emotional distress against TBS, Rainey, and Hooper; and a violation of the federal wiretapping statute, 18 U.S.C. § 2511, against TBS, Rainey and Hooper.

I. The federal defendants' Motion to Dismiss or, in the alternative, for Summary Judgment.

Standard of Review

When deciding a motion for summary judgment, the Court generally looks to whether material issues of fact are in dispute. Fed. R. Civ. P. 56(e). However, when the summary judgment motion is based on qualified immunity, a court must consider the law as it was established at the time of the incident. Romero v. Kitsap County, 931 F.2d 624, 628 (9th Cir. 1991).

The defense of qualified immunity applies to government officials and protects all "but the plainly incompetent or those who knowingly violate the law." Schroeder v. McDonald, 55 F.3d 454, 461 (1995) (citations omitted). Even officials who violate the Constitution are to be accorded qualified immunity and, therefore, escape money damages if, in their performance of discretionary duties, their actions do not violate "clearly established constitutional or statutory rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Elder v. Holloway, 114 S. Ct. 1019, 1021 (1994). Under the summary judgment standard for qualified immunity, the Court must determine if the plaintiff has alleged a violation of law that was clearly established at the time of the alleged violation. See Romero, 931 F.2d at 627-28. If the law was not clearly established, then the official is immune from suit as a matter of law, any factual disputes are rendered immaterial, and summary judgment is appropriate. See Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Romero, 931 F.2d at 628. The determination of whether an asserted federal right was clearly established at a particular time is a question of law. Elder, 114 S. Ct. at 1023.

Therefore, the qualified immunity test essentially requires the following three steps: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" that a reasonable officer would

have been aware of it; and 3) the determination of whether a reasonable officer could have believed that the conduct at issue was lawful. Romero, 931 F.2d at 627.

The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents executing a valid search warrant allowed representatives of the news media to observe and document the search. The contours of the right must have been sufficiently clear in 1993 that a reasonable officer would have understood that what he was doing violated that right. Anderson v. Creighton, 483 U.S. 635, 640 (1987). In light of pre-existing law, the unlawfulness of the act must have been apparent. Id. If the law was not clearly established, then summary judgment must be granted.

Discussion

A. Motion for Summary Judgment

In their motion, defendants ask the Court for an order finding that federal law enforcement agents who allowed a news media camera crew to accompany them during the execution of a valid search warrant did not violate any clearly established Fourth Amendment rights and that, therefore, they are entitled to qualified immunity. See Harlow, 457 U.S. at 818 (if law was not "clearly established" at time of incident, then summary judgment is proper). The Bergers contend that it was clearly established at the time of the search that it is a violation of the Fourth Amendment to allow a media camera crew at the execution of a search warrant for reasons other than a legitimate law enforcement purpose.

The operation of the Harlow qualified immunity standard greatly depends upon the level of generality in which the relevant "legal rule" is identified. Anderson, 483 U.S. at 639; Camarillo v. McCarthy, 998 F.2d 638, 640 (9th Cir. 1993). A

plaintiff who has a suit based upon a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. Anderson, 483 U.S. at 639. The Anderson Court noted as an example of abstract rights that "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." Anderson, 483 U.S. at 639. The right referred to by the Harlow test is not a general constitutional guarantee, but rather it is the application in a particular context. See Todd v. United States, 849 F.2d 365, 370 (9th Cir. 1988).

The Harlow standard is an objective inquiry. Kirkpatrick v. Los Angeles, 803 F.2d 485, 490 (9th Cir. 1986). A plaintiff seeking damages from a government official bears the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act. See, e.g., Shoshone-Bannock Tribes v. Fish & Game Comm'n of Idaho, 42 F.3d 1278, 1285 (9th Cir. 1994),; Davis v. Scherer, 468 U.S. 183, 197 (1984). In deciding whether the law was clearly established at the relevant time, the court must "survey the legal landscape" as it existed at the time of the conduct in question. Figueroa v. United States, 7 F.3d 1405, 1409 (9th Cir. 1993), cert. denied, 114 S. Ct. 1537 (1994); Wood v. Ostrander, 879 F.2d 583, 591 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990).

The survey of the legal landscape begins by examining the binding Supreme Court and Ninth Circuit decisions. Kirkpatrick, 803 F.2d at 490. In the absence of binding Supreme Court or Ninth Circuit precedent, courts in this circuit reviewing a qualified immunity defense must look to all available decisional law, including cases from other state, circuit, and district courts. Figueroa, 7 F.3d at 1409; Wood, 879 F.2d at 591. The analysis begins by examining those cases that are

"most like" the instant case. Figueroa, 7 F.3d at 1409. Finally, because the question is whether the relevant law was so clearly established at the time of the conduct at issue that a reasonable officer could be said to "know" his conduct was unlawful, post-incident decisions may not be considered. See Harlow, 457 U.S. at 818-19; Baker v. Racansky, 887 F.2d 183, 187 (9th Cir. 1989).

The Bergers attempt to satisfy their burden of demonstrating that the constitutional rights at issue were clearly established by relying on United States v. Sanusi, 813 F. Supp. 149, 157-59 (E.D.N.Y. 1992), and Ayeni v. CBS, Inc., 848 F. Supp. 362, 368 (E.D.N.Y. 1994). The Ayeni case arose from the search underlying the Sanusi case. Both cases, however, can be distinguished.

The Sanusi case involved the news-gathering privileges of the media and whether the media had to turn over to the defendant a videotape taken at the execution of a search warrant. The case did not involve the question of qualified immunity.

The district court in Ayeni was affirmed by the Second Circuit in Ayeni v. Mottola, 35 F.3d 680 (1994), cert. denied, 115 S. Ct. 1689 (1995). The Ayeni case is distinguishable because the Second Circuit Court allowed the plaintiff to defeat the rule of qualified immunity by addressing and analyzing the alleged violation of an extremely abstract right. Unlike the search in the case at bar, the Ayeni case involved the search of a home, where privacy interests are at their greatest. The Ayeni Court addressed the general Fourth Amendment right of privacy and held that the right had been violated when a news crew entered the house during the execution of a search warrant. Ayeni, 35 F.3d at 686.[1] The Sixth Circuit and this Court

[1] In analyzing the general Fourth Amendment right instead of the specific application of that right, the Ayeni Court stated that it has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties. The court concluded that a special agent exceeded those well-established principles when he brought into the plaintiff's home a television news crew that was neither authorized by the warrant nor serving any legitimate law enforcement purpose. Ayeni, 35 F.3d at 686.

recognize the error made by the Second Circuit. See Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) (criticizing the Ayeni Court for describing the violation in abstract and general terms, contrary to the Supreme Court's instructions in Anderson).

Additionally, the Ayeni case was decided subsequent to the Berger search. Therefore, the holding in the case should not be considered in determining whether the law was clearly established at the time the events at issue occurred. See Baker, 887 F.2d at 187 (post-incident decisions cannot clearly establish the law at the time of the conduct in question).

Furthermore, citing to United States v. Wright, 667 F.2d 793 (9th Cir. 1982), and United States v. Clouston, 623 F.2d 485 (6th Cir. 1980), the Bergers assert that existing case law establishes that it is unconstitutional for officers to delegate their authority or to bring private persons along to execute warrants unless the private persons are necessary to provide reasonable assistance in the execution of the warrant. Both of these cases, however, involved persons who actively participated with the officers in a search for evidence. These cases demonstrate only that at the time of the Berger search the Fourth Amendment did not prohibit the use of a third party at a search if that party was aiding the officer in searching for items either specified in the warrant or within plain view of those items specified. See Wright, 667 F.2d at 797 (officer executing a warrant that authorized seizure of driver's license may utilize assistance of law enforcement officer involved in separate narcotics conspiracy investigation involving same people); Clouston, 623 F.2d at 486-87 (presence of telephone company employee, who

was used to identify equipment reasonably believed to be found near equipment specified in warrant, did not render search unconstitutional). The cases did not involve the question of the lawfulness of allowing media representatives to observe and document the searching officers' own execution of a warrant. In fact, the media was not involved in either case.

Finally, in a supplemental filing, the plaintiffs presented the case of Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) in support of their position. The Buonocore decision is distinguishable because the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant. Buonocore, 65 F.3d at 350. Furthermore, although the search in Buonocore took place late in 1992, the decision was rendered years after the 1993 Berger search.

The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

The federal defendants cite to several cases to demonstrate that decisional law did not "clearly establish" the proposition that government agents executing a warrant violated

constitutional rights by allowing media representatives to attend and observe. For example, in Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984), the Court found that officers did not violate the Fourth Amendment when they told the media what time the search would be executed and then refused to make the media leave during the execution of the warrant, even though the property owner asked that they be removed. The federal defendants also cite two unpublished district court cases, Higbee v. Times-Advocate, 5 Med. L. Rptr. 2372 (S.D. Cal. Jan. 9, 1980) and Moncrief v. Hanton, 10 Med. L. Rptr. 1620 (N.D. Ohio Jan. 6, 1984). In both cases, summary judgment was entered in favor of defendants who allowed media coverage at the execution of a search warrant.

Another case cited by the federal defendants, Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980), was dismissed when police allowed a reporter, who learned about the search on the police scanner, to observe the search. The court stated that it was unwilling to accept the proposition that an otherwise reasonable search would be made unreasonable by the filming and television broadcast of the search. Id. at 774.

The Bergers attack these cases because two are unpublished, the other is a state court case, and none are authoritative. But, the cases cited by the federal defendants help demonstrate that courts (and officers) were lacking clear authority on this issue at the time of the Berger search.

In addition to case law, the Bergers also rely on 18 U.S.C. § 3105, which identifies who may serve search warrants. The Bergers argue that the statute provides guidance on the constitutional issue of what constitutes "reasonableness" under the Fourth Amendment. The statute provides:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his

requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1985).

The case at bar does not involve a situation in which CNN was helping to serve or execute the warrant. CNN was simply observing the agents who were serving the warrant. The statute prevents officers who obtain a warrant from using the warrant themselves or allowing others to use the warrant as a means of expanding an otherwise valid and judicially-approved search into a general search for things not specified in the warrant. Neither 18 U.S.C. § 3105 on its face nor pre-March 1993 case law interpreting the statute clearly establish that the presence of a news crew, or any other third person observer not actively participating in a search or seizure, violates the Fourth Amendment.

The mere fact that later cases may have extended pre-existing legal principles in a way that makes the defendants' conduct unlawful does not mean that the unlawfulness of that conduct was "clearly established" at the time of the search. See Mitchell v. Forsyth, 472 U.S. 511, 530-35 (1985). When "all available decisional law" at the relevant time is considered, the most that can be said of the legal landscape as it stood in March 1993 is that the law was perhaps beginning to evolve toward the view that the Fourth Amendment may prohibit the presence of media observers during the execution of a valid search warrant. This Court finds that the law was not clearly established in March 1993 and, therefore, the FWS agents and AUSA McLean are entitled to qualified immunity.

II. Motions for Judicial Notice

In addition to their brief and statement of uncontroverted facts in support of their motion, the federal defendants rely on the Certification of Scope of Employment as prepared by Helene M. Goldberg, Director of the Torts Branch, Civil Division,

United States Department of Justice. The Bergers do not oppose the defendants' motion that this Court take judicial notice of the certification. The Court grants the defendants' request for certification.

The federal defendants also ask this Court to take judicial notice of certain materials from the proceedings in the matter of United States v. Paul W. Berger, No. CR 93-46-BLG-RWA (D. Mont.). Specifically, they ask that notice be taken of the information filed May 5, 1993, and of excerpts from testimony given August 11, 1993 by Special Agent Joel Scrafford in the same matter. The defendants hardily contest the motion. The Court did not rely on the material in determining whether the law at issue was clearly established at the time of the Berger search. However, the Court did not consider the motion for judicial notice on its merits. The motion is moot.

III. The defendants' (TBS, Rainey, and Hooper) motion for summary judgment.

The defendants TBS, Rainey, and Hooper are moving this Court for summary judgment. TBS is engaged in the business of broadcasting entertainment, news and information programs. Rainey and Hooper are agents of CNN and served on the camera crew during filming of the execution of the Berger search.

Standard of Review

First, the Court finds it instructive to review the standards applicable to motions for summary judgment. Fed. R. Civ. P. 56(c) states summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party must initially identify those portions of the record before the Court which it believes establish an absence of

material fact. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). If the moving party adequately carries its burden, the party opposing summary judgment must then "set forth specific facts showing that there is a genuine issue for trial." Kaiser Cement Corp. v. Fischback & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986).

All reasonable doubt as to the existence of genuine issues of material fact must be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Nevertheless, "[d]isputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." T.W. Elec. Serv., 809 F.2d at 630 (citing, Liberty Lobby, 477 U.S. at 248). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense." Id.

If a rational trier of fact might resolve disputes raised during summary judgment proceedings in favor of the nonmoving party, summary judgment must be denied. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Thus, the Court's ultimate inquiry is whether the "specific facts" set forth by the nonmoving party, viewed along with the undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence. Id. at 631. Having so stated, the Court now turns to the merits of the pending motion.

Discussion

The defendants TBS, Rainey, and Hooper (the media defendants) move for summary judgment on four grounds. First, the media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. Second, they argue that as a matter of law, there is no constitutional, statutory or common

law liability for recording voluntary conversations with law enforcement officers or videotaping areas outside the family residence. Third, they allege that the Bergers have failed to plead or otherwise satisfy the standards required under the First Amendment for the requested injunction. Finally, the media defendants allege that the Bergers cannot fulfill the requirements for their common law theories.

A. Collateral Estoppel

The media defendants claim that the Bergers' constitutional claims were already litigated in the criminal case and their action is barred by collateral estoppel. The Bergers, however, argue that the action is not barred because the issues in the two cases are different. Specifically, the plaintiffs assert that the Fourth Amendment was not previously adjudicated, that TBS' involvement was not considered, and that Mrs. Berger was not a party.

The Bergers' arguments are not persuasive. CNN and TBS shared the same role in the search; they were essentially one in the same. Consideration of CNN's involvement in the prior suit is essentially consideration of TBS's involvement. The same argument holds true for Mrs. Berger. She is in privity with Mr. Berger. She held the same position as Mr. Berger and went through the same experience. If his rights were not violated, her rights were not violated.

In the criminal case against Berger, the defendant sought to suppress evidence obtained in the search on the basis that his Fourth Amendment rights had been violated. United States v. Paul W. Berger, CR 93-46-BLG-RWA (D. Mont. 1993). Berger argued that the search was illegal. Magistrate Judge Anderson held a full hearing on these issues. Because the search conducted at the ranch did not violate the Fourth Amendment, Magistrate Judge Richard W. Anderson denied the suppression motion. In the case at bar, the plaintiffs are again arguing that their Fourth Amendment rights were violated by the search.

Magistrate Judge Anderson's holding in the criminal case, however, bars a Bivens action in this case. See Matthews v. Macanas, 990 F.2d 467, 468 (9th Cir. 1993) (if a court in a criminal case holds that a search warrant is supported by probable cause and constitutional rights were not violated, a subsequent Bivens civil action is barred by collateral estoppel); Bagley v. CMC Real Estate Corp., 923 F.2d 758, 762 (9th Cir. 1991) (plaintiff estopped from bringing a civil action because issue determined in criminal case), cert. denied, 502 U.S. 1091 (1992). A Bivens action authorizes a cause of action against persons, acting under color of federal law, for violations of constitutional rights. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Because the constitutionality of the search has already been litigated, the causes of action based on the constitutionality of the search are barred by collateral estoppel.[2]

The Bergers' Fourth Amendment claims against the media defendants arising from the videotaping of various places on the ranch also fail because the media defendants were not acting under color of law when they filmed the execution of the search. When a private party, such as TBS, is present during a search as a means of furthering its own interests, it is not acting under color of federal law and is not liable under Bivens. See United States v. Miller, 688 F.2d 652, 657-58 (9th Cir. 1982); United States v. Jennings, 653 F.2d 107, 110 (4th Cir. 1981). In this case, the defendants were not acting under the color of federal law.[3]

---

[2] The videotaping of an execution of a valid search and seizure warrant does not render an otherwise reasonable search and seizure unreasonable. Prahl v. Brosamle, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980).

[3] To establish a Bivens action, the Bergers must prove that the media defendants (1) acted under the color of federal law and (2) deprived them of constitutionally protected rights. Because this Court determined that one prong was not met, this Court need not analyze the second prong.

B. Federal wiretap statutes

The Bergers claim that the media defendants "intercepted" their communications with the federal officers in violation of the Wiretap Act. The media defendants are entitled to summary judgment on the wiretap claims because the federal agents consented to the recording.

The Wiretap Act prohibits the intentional interception of certain communications, but expressly allows persons to intercept and record communications under certain other conditions. Section 2511(2)(d) of the Act provides in pertinent part that:

> [i]t shall not be unlawful . . . for a person not acting under color of law to intercept a[n] . . . oral . . . communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. § 2511(2)(d) (1970 & Supp. 1995).

The statute specifically provides that it is not unlawful to intercept oral communications where one of the parties has given prior consent. In the case at bar, law enforcement consented to TBS recording the conversations. The exception to this statute does not apply because this Court does not find that the media defendants made the recordings for the purpose of committing a crime or tortious act. Instead, the recordings were made for the purpose of producing a news story and for the defendants' commercial gain. Since the Act provides that

there is no liability to a third party if one party to the conversation consents to the third party recording and since the exception does not apply, the media defendants did not violate the Wiretap Act. See, e.g., Desnick v. American Broadcasting Co., Inc., 44 F.3d 1345, 1353 (7th Cir. 1995) (wiretap statutes allow one party to have conversation recorded unless his purpose is to commit a crime or tort); United States v. Mullins, 992 F.2d 1472, 1478 (9th Cir. 1993) (no violation of Fourth Amendment where one party consented to the monitoring of wire communications), cert. denied, 114 S. Ct. 556 (1993).

C. Request for Injunction

The Bergers seek an injunction preventing TBS, Rainey, and Hooper from broadcasting or selling all or part of the videotape and recordings gathered during the search. They make this request though the segment has already been broadcast several times and has not aired in more than a year.

The request is essentially a request for a prior restraint, which carries a "heavy presumption against its constitutional validity." CBS, Inc. v. Davis, 114 S. Ct. 912, 914 (1994) (citations omitted). The term "prior restraint" is used to describe administrative and judicial orders issued in advance of the time that communications are to occur and forbidding that those communications occur. Alexander v. United States, 113 S. Ct. 2766, 2771 (1993). While the prohibition against prior restraints is not absolute, the gagging of publication has been considered acceptable only in "exceptional cases." CBS, 114 S. Ct. at 914.

The plaintiffs have not shown that this case is an exceptional case that would justify the imposition of a prior restraint.

D. Common law Claims

The Bergers have pled several state law claims against TBS, Rainey and Hooper, including conversion, trespass, and

intentional infliction of emotional distress.[4]

1. Conversion

In their conversion count, the plaintiffs allege that the media defendants intentionally and wrongfully entered the Berger Ranch and wrongfully seized and appropriated both statements and private images of the Bergers, their premises, and possessions. The media defendants contend that the images and voices cannot be the subject of a conversion action.

The elements necessary for a conversion action in Montana include ownership of property, a right of possession, unauthorized dominion over that property by another, and damages that result. Eatinger v. Johnson, 887 P.2d 231, 234 (Mont. 1995). The Ninth Circuit has held that three criteria must be met before the law will recognize a property right. First, there must be an interest capable of precise definition. Second, that interest must be capable of exclusive possession or control. Finally, the putative owner must have established a legitimate claim to exclusivity. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 903 (9th Cir. 1992), cert. denied, 113 S. Ct. 2927 (1993).

The Montana Supreme Court has never held that recorded sounds and images can be the subject of a conversion action. Other courts however have concluded that they cannot. See, e.g., Ault v. Hustler Magazine, Inc., 860 F.2d 877, 883 (9th Cir. 1988) (use of one's photographic image is not proper grounds for conversion action), cert. denied, 489 U.S. 1080 (1989);

---

[4] The amended complaint also pled a claim of trespass against AUSA McLean. The United States was later substituted as the sole defendant for the claim of trespass against AUSA McLean pursuant to the Federal Employee Liability Reform and Tort Compensation Act. The claim against the United States for trespass was recently dismissed without prejudice by this Court in its December 15, 1995 and December 20, 1995 orders.

Zacchinin [sic] v. Scripps Howard Broadcasting Co., 351 N.E.2d 454, 457 (Ohio 1976) (one's image is not converted by being photographed), rev'd on other grounds, 433 U.S. 562 (1977); Ippolito v. Lennon, 542 N.Y.S.2d 3, 6 (N.Y. App. Div. 1989) (any possible interest by musician in his performance contained on video and sound recording is intangible and not actionable as conversion). See also, FMC Corp. v. Capital Cities/ABC, 915 F.2d 300, 303 (7th Cir. 1990) (retaining copies of documents not sufficient to constitute conversion). This Court agrees with those courts that have found that the use of photographed or videotaped images and sound recordings does not give rise to a cause of action for conversion.

Conversion requires the intentional exercise of dominion and control over a chattel. Ault v. Hustler Magazine, Inc., 860 F.2d at 883. The Bergers assert that the twenty-two tapes containing the images and statements of the Bergers are tangible chattel giving rise to the conversion action. The plaintiffs' argument was rejected by the Ninth Circuit in Ault. The Ault Court held that the photographs were the property of the photographer, not of the person photographed. Id. While the tapes may be viewed as tangible chattel, it is the chattel of the defendants, not of the Bergers. Therefore, there was no conversion of Berger's chattels. Id.

2. **Trespass**

The Bergers also allege that the media defendants trespassed when they entered the Berger ranch to observe the execution of the search warrant. Consent of the owner, possessor, or another authorized to consent, however, is an absolute defense to trespass. See Salisbury Livestock Co. v. Credit Union, 793 P.2d 470, 475 (Wyo. 1990).

In this case, the federal government had temporary control and possession of the property while executing the search warrant. CNN had the permission of the federal government to

be present during the execution of the search warrant.[5] The plaintiffs' amended complaint acknowledges that permission was given by the government. The letter from CNN to AUSA McLean dated March 11, 1993 was sent to confirm that permission. (Pl.'s Statement of Facts, Exhibit A).

Furthermore, the media defendants did not invade the property interests protected by the tort of trespass. See Desnick, 44 F.3d at 1352. The execution of the warrant was not disrupted by the presence of the media. The media was present for the purpose of news coverage only. In this case, the recorded transcript from CNN submitted by the plaintiffs, along with their attorney's affidavit in response to this motion, does not reveal that the crew was asked to leave, even though Mr. Berger apparently acknowledged that his picture was being taken. (Lansing's Aff., Ex. 8 at tape 08 page 13). Furthermore, any argument that the Bergers did not know the crew was a news crew is not dispositive. "[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent." Desnick, 44 F.3d at 1351.

This Court finds that the media defendants are not liable under a cause of action for trespass.

3. **Intentional Infliction of Emotional Distress**

Finally, the Bergers allege a cause of action for intentional infliction of emotion [sic] distress. Montana allows a separate cause of action alleging intentional infliction of emotional distress. Sacco v. High Country Indep. Press, Inc., 896 P.2d 411 (1995). This independent cause of action may arise if there was serious or severe emotional distress to the plaintiff which

---

[5] This Court has already ruled that the government agents have qualified immunity for their actions in allowing the media to accompany them. The media's reliance on that permission was not unreasonable.

was a reasonably foreseeable consequence of the defendant's negligent or intentional act or omission. Sacco, 896 P.2d at 429. It is a question of law whether a plaintiff has introduced sufficient evidence to support a prima facie case for intentional infliction of emotional distress. Sacco, 896 P.2d at 427.

This Court has already found that the media defendants did not trespass when they accompanied the government during the execution of the search warrant. They are also not liable for recording conversations during the search or for capturing videotaped images of plaintiffs. Furthermore, the media defendants are not liable for broadcasting a truthful, newsworthy story. Since no tortious conduct took place, emotional distress was not a reasonably foreseeable consequence of their actions. The Bergers' intentional infliction of emotional distress claim fails.

E. Declaratory Judgment

The Bergers are asking for declaratory judgment declaring essentially that the federal agents and the media defendants violated the Bergers' constitutional rights. The declaratory relief sought is redundant of the claims already addressed in this opinion.

Courts generally recognize two criteria for determining whether declaratory relief is appropriate: "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Eureka Fed. Sav. and Loan Ass'n v. American Cas. Co. of Reading, Pa., 873 F.2d 228, 231 (9th Cir. 1989) (citations omitted). In light of this opinion, the declaratory judgment requested by the Bergers is not warranted.

Accordingly,

IT IS ORDERED:

1. The federal defendants' motion for summary judgment is granted.

2. The federal defendants' request for judicial notice of the Certification of Scope of Employment is granted.

3. The federal defendants' request for judicial notice is moot.

4. The media defendants' motion for summary judgment is granted.

5. In light of these rulings, the plaintiffs' motion to set preliminary pretrial conference is denied as moot.

6. The Clerk of Court shall forthwith enter summary judgment in favor of the defendants and against the plaintiffs.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and **DATED** this 26th day of February, 1996.

/s/ Jack D. Shanstrom
United States District Judge

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA, *Defendants-Appellees*.	No. 96-35251 DC No. CV-95-00046-JDS
PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation, *Defendants-Appellees*.	No. 96-35266 DC No. CV-94-00046-JDS (D. Montana) ORDER

Before: SCHROEDER and KLEINFELD, Circuit Judges, and BREWSTER,* District Judge.

The panel as constituted above has voted to deny the petitions for rehearing and to reject the suggestion for rehearing en banc.

*Honorable Rudi M. Brewster, United States District Judge for the Southern District of California, sitting by designation.

The full court has been advised of the suggestions for rehearing en banc and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

FILED

FEB 25 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. RODNEY C. HANLON; JOEL SCRAFFORD; RICHARD C. BRANZELL; ROBERT PRIEKSAT; KRIS A. MCLEAN; TURNER BROADCASTING SYSTEM, INC., a Georgia corporation; ROBERT RAINEY; DONALD HOOPER; UNITED STATES OF AMERICA, *Defendants-Appellees*.	)	No. 96-35251 DC No. CV-95- 00046-JDS
PAUL W. BERGER and ERMA R. BERGER, *Plaintiffs-Appellants*, v. JACK HAMANN; CABLE NEWS NETWORK, INC., a Georgia corporation, *Defendants-Appellees*.	)	No. 96-35266 DC No. CV-94- 00046-JDS (D. Montana)
	)	ORDER

Before: SCHROEDER, Circuit Judge.

The Motion to Stay the Mandate Pending Filing of a Petition for Certiorari is granted pursuant to Federal Rule of Appellate Procedure 41.

F I L E D

MAR 13 1998

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Supreme Court, U.S.
FILED
JUN 27 1998
OFFICE OF THE CLERK

No. 97-1927

In The

Supreme Court of the United States

October Term, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT AND KRIS A. McLEAN,

Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JAY F. LANSING
MOSES LAW FIRM
The Terrace – Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103
(406) 248-7702

HENRY H. ROSSBACHER*
NANCI E. NISHIMURA
TRACY W. YOUNG
DAVID F. DESMOND
ROSSBACHER & ASSOCIATES
Union Bank Plaza, 24th Floor
445 South Figueroa Street
Los Angeles, California 90071
(213) 895-6500

*Counsel of Record

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the application of this Court's settled qualified immunity standards to particular facts require this Court's review?

2. Does a decision finding that law enforcement violates the Fourth Amendment when a Department of Justice attorney and federal agents conspire to allow the media to enter private property and to film and to record private persons and conversations while federal agents execute a search warrant which does not authorize the presence or actions of the media require this Court's review where there is no conflict between the decisions of the United States Courts of Appeals on this issue?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	4
B. Basis for Federal Jurisdiction Below	11
WHY THE GOVERNMENT AGENTS' PETITION SHOULD NOT BE GRANTED	13
I. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY STANDARD AND THE ONLY DISPUTE IS IN ITS RESULT	15
II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE LAW GOVERNING THE CONSTITUTIONAL ISSUE	22
CONCLUSION	25

TABLE OF AUTHORITIES

Page

FEDERAL

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 16, 25

Avenson v. Zegart, 577 F.Supp. 958 (D. Minn. 1984) 19

Ayeni v. CBS Inc., 848 F.Supp. 362 (E.D.N.Y. 1994)...12, 18

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995)..... *passim*

Backlund v. Barnhart, 778 F.2d 1386 (9th Cir. 1985) 17

Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992).....20, 24

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 11, 14, 18, 25

Boyd v. United States, 116 U.S. 616 (1886)..... 18

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) ...12, 20

Dennis v. Sparks, 449 U.S. 24 (1980) 23

Figueroa v. United States, 7 F.3d 1405 (9th Cir. 1993) 17

Fox v. Acadia State Bank, 937 F.2d 1566 (11th Cir. 1991)..... 19

Harlow v. Fitzgerald, 457 U.S. 800 (1982).. 12, 15, 16, 23

Higbee v. Times-Advocate, Inc., 5 Media L. Rep. (BNA) 2372 (S.D. Ca. 1980).....12, 19

Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983)..... 23

Katz v. United States, 389 U.S. 347 (1967).....16, 18

Kirkpatrick v. Los Angeles, 803 F.2d 485 (9th Cir. 1986)..... 17

Marron v. United States, 275 U.S. 192 (1927) 18, 22

Mitchell v. Forsyth, 472 U.S. 511 (1985) 16, 23

TABLE OF AUTHORITIES – Continued

Page

Moncrief v. Hanton, 10 Media L. Rep. (BNA) 1620 (N.D. Oh. 1984) 12, 19

Ostlund v. Bobb, 825 F.2d 1371 (9th Cir. 1987) 17

Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997) 23, 24

Parker v. Clarke, 905 F.Supp. 638 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997) 24

Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997) 23, 24

Procunier v. Navarette, 434 U.S. 555 (1978) 14

Roe v. Wade, 410 U.S. 113 (1973) 19

Romero v. Kitsap County, 931 F.2d 624 (9th Cir. 1991) 17

Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho, 42 F.3d 1278 (9th Cir. 1994) 16, 17, 23

Siegert v. Gilley, 500 U.S. 226 (1991) 23

Sloman v. Tadlock, 21 F.3d 1462 (9th Cir. 1994) 17

Soldal v. Cook County, 506 U.S. 56 (1992) 19

Stack v. Killian, 96 F.3d 159 (6th Cir. 1996) 20

United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) 21, 23

United States v. Lanier, 520 U.S. 259 (1997) 14, 25

United States v. Sanchez, 509 F.2d 886 (6th Cir. 1975) 21

United States v. Schwimmer, 692 F.Supp. 119 (E.D.N.Y. 1988) 21

TABLE OF AUTHORITIES – Continued

Page

United States v. United States Dist. Ct. (Keith), 407 U.S. 297 (1972) 16

United States v. Warren, 550 F.2d 219 (5th Cir. 1977) 21

United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 21, 23

Wilson v. Layne, 141 F.3d 111, 1998 U.S. App. LEXIS 6863 (4th Cir. 1998) 23, 24

Winston v. Lee, 470 U.S. 753 (1985) 19, 23

Woodward v. Worland, 977 F.2d 1392 (10th Cir. 1992) 19, 23

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV 19

Federal Rules of Criminal Procedure
Rule 41 20

Federal Rules of Evidence
Rule 201 9

United States Code, Title 5
§ 552a 22

United States Code, Title 18
§ 242 14

§ 2234 20

§ 2236 20

§§ 2510, *et seq.* 11

§ 3105 ..... *passim*

§ 3109 20

TABLE OF AUTHORITIES – Continued

Page

United States Code, Title 28
§ 1254(1) 2
§ 1291 11
§ 1331 11
§ 1367(a) 11
United States Code, Title 42
§ 1983 14
Code of Federal Regulations, Title 28
§ 50.2(b)(1)-(6) 22
United States Supreme Court
Rule 12.5 2

STATE

CASES

Anderson v. WROC-TV, 441 N.Y.S.2d 220 (1981) 20
Prahl v. Brosamle, 295 N.W.2d 768 (1980) 19

MISCELLANEOUS

Department of Justice Manual, 1-7.001 at 1-285 (1990-1 Supp.); 1-7.000 (1993 Supp.) 22

RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Paul W. Berger and Erma R. Berger (the "Bergers") respectfully submit their opposition to the Petition for Writ of Certiorari filed by the Government Agent Petitioners, Special Agents of the United States Fish & Wildlife Service ("FWS") Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell") and Robert Prieksat ("Prieksat"); and Assistant United States Attorney Kris A. McLean ("AUSA McLean") (collectively the "Government Agents").

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 129 F.3d 505 and entitled *Berger v. Hanlon*. App. 1a. The decisions of the District Court are unreported. App. 27a, 48a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997, reversing in part and affirming and remanding in part, the District Court's dismissal of the Bergers' two related civil actions. The Government Agent and Media defendant-appellees filed separate Petitions for Rehearing and Suggestion for Rehearing En Banc which were both denied

on February 25, 1998.[1] App. 61a. The Government Agents and Media filed Petitions for Writs of Certiorari which were both docketed on May 28, 1998. Justice Sandra Day O'Connor extended the time to oppose the Petitions until July 27, 1998.[2] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. Const. amend. IV.

Section 3105 of Title 18 of the United States Code also applies in this case and provides that,

[1] The Media Petitioners are Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Turner Broadcasting System, Inc. ("Turner"), Robert Rainey ("Rainey") and Donald Hooper ("Hooper") (collectively the "Media"). The Bergers have filed a separate Brief in Opposition to the Media's Petition.

[2] On June 29, 1998, the Bergers filed a Conditional Cross-Petition to the Media's Petition pursuant to United States Supreme Court Rule 12.5.

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105.

STATEMENT OF THE CASE

The Government should not be allowed to use a search warrant as a "press pass" for the Media. In March 1993, the Government Agents, including an Assistant United States Attorney, were engaged in a confidential investigation.[3] The Government Agents knew that the investigation was confidential. Their plans included obtaining a sealed search warrant. Yet, when the Media asked to videotape and to record the search of the Berger Ranch for a story, the Government Agents readily obliged, agreeing to accommodate the Media in exchange for favorable publicity. What is troubling about the Government Agents' characterization of the facts before this Court is their minimization of their actions.

The Government Agents' conduct was nothing less than outrageous. Star-struck and eager, the Government Agents conspired with the Media to allow the Media to enter private property and to film and to record the

[3] The Government was investigating allegations that Mr. Berger improperly used a pesticide to control predator attacks on his sheep and killed federally-protected eagles as a consequence.

Bergers and their conversations while Government Agents executed a sealed search warrant which did not authorize the presence or actions of the Media. The Department of Justice attorney actually executed a contract with the Media allowing the Media to join the search. The Government Agents assisted the Media to videotape and to record staged scenes, gave on-camera interviews and helped to divert discovery of the Media's identity by the Bergers. The Department of Justice attorney actually agreed to, and did, hold an "exclusive" press conference on the Bergers' property in order to provide footage for the broadcast. The Government Agents were intertwined and indistinguishable from the Media.

The Government Agents exceeded the extent to which clearly established Fourth Amendment rights can be invaded by law enforcement in the execution of a search warrant. They are not protected by qualified immunity. Although Mr. Berger was acquitted of felony charges and convicted of a misdemeanor for using a pesticide contrary to its labelling, to all the world Mr. Berger was unwittingly cast by the Government Agents and the Media as a rogue rancher who killed eagles.

A. Factual Background

In early 1993, the Media contacted Agent Scrafford and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation. ER 1:¶¶34-36, 37/A; ER 5/A; ER 2:¶2; ER 6:¶¶18-20;

ER 8/7:36:5-25.[4] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings ("outtakes") which the Media intended to and did broadcast repeatedly worldwide on their various television outlets. App. 4a-5a; ER 1/A; ER 5/A; ER 8/1[5] ; ER 1:¶¶34-40; ER 6:¶¶1, 18-24, 34-50, 68, 69. The Media, in turn, granted the Government Agents' express desire to publicize their personal efforts to enforce environmental laws. ER 8/1, 8/2, 8/8:T11:7-8.[6]

A week later, a United States Magistrate Judge issued the search and seizure warrants but was never advised of the Agreement nor of the Media's intended participation. The Magistrate Judge did not authorize the Media's presence, nor their cameras and microphones. ER 8/3, 8/4; ER 1:¶¶47-48; ER 6:¶¶25-27. The search warrant only

---

[4] Citations are to the Excerpts of Record ("ER") filed by the Bergers in Hanlon Appeal No. 96-35261 to the tab number within the ER and the exhibit number and/or page and/or paragraph number within the tab.

[5] Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[6] References to "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." ER 8/8.

authorized a search of "The Paul W. Berger Ranch with appurtenant structures, excluding the residence." ER 6:¶28; ER 7:¶7.[7]

By pre-arranged plan, the Government Agents allowed the Media to be an integral part of the Government convoy of vehicles when the search of the Berger Ranch commenced before dawn on March 24, 1993. ER 8/8:T6-T7:2. With the Government Agents' assistance, the Media video and audio taped the convoy both from inside a Government vehicle and mounted one of their cameras on the exterior of another Government vehicle driven by Government Agents. ER 6:¶34; ER 8/8:T6:2-T7:2.

Media cameras were focused on Mr. Berger as he came upon the convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. ER 7:¶¶2-3; ER 8/8:T7:2. Mr. Berger was not given a copy of the search warrant but was told by Agent Scrafford that a search warrant was about to be executed at his Ranch and that the Court had ordered a search of every building;

---

[7] The Media were also permitted by the Government Agents to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. ER 1:¶¶49-52; ER 6:¶¶29-33; ER 8/2, 8/8T1:3-4, T3:1-5, T:1-6. The Media were made privy to confidential information about the Bergers and the criminal investigation against Mr. Berger, including details about the sealed warrants and their execution. In addition, the Government attorney had agreed to give the Media an "exclusive" interview on the Berger Ranch during the search. ER 8/2.

Agent Scrafford did not state that the residence was excluded. ER 6:¶36; ER 7:¶¶4, 7; ER 8/8:T7:6. Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[8] Mr. Berger drove him as requested. ER 7:¶5; ER 8/8:T7:1-16. Agent Scrafford informed Mr. Berger that he would be imprisoned in Billings if he did not cooperate with the federal authorities. ER 8/8T:3. Mr. Berger was shaking and very upset. ER 7:¶17; ER 8/8:102:13-15.[9]

The Media were active participants in the search, contrary to the Government Agents' characterization of the facts. Mr. Berger, for example, never knew that Agent Scrafford was the Media's human "boom mike." Agent Scrafford wore a hidden microphone installed by the Media to record secretly everything said, solely for the Media's benefit. ER 6:¶37; ER 7:¶5-6. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. ER 6:¶¶37, 38, 41-42; ER 7:¶¶5, 8-13; ER 8/8:T7:1-16. Mr.

---

[8] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had yet been brought against Mr. Berger at the time of the search. ER 8:¶8; ER 8/3, 8/4.

[9] At the time, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. ER 7:¶17.

Berger was never advised of any of his rights, including the right to remain silent. ER 6:¶¶39, 40; ER 7:¶¶9, 14; ER 8/8:T7:1-16.

The Government Agents knew that the Media could not lawfully enter the Berger Ranch. While Agent Scrafford would later testify that he advised the Media that they could not enter the Berger Ranch during the search, on the day of the search, he and the other Government Agents facilitated the Media's entry onto the Berger Ranch and into their residence. ER 8/7:37, 115; ER 8/8:T7:15-26. And although the Berger residence was excluded from the Search Warrant, Agents Scrafford and Branzell entered the Bergers' home and brought the Media microphone inside.[10] Unbeknownst to the Bergers, their conversations were secretly monitored and recorded by the Media through Agent Scrafford's hidden microphone. CNN/P 6; ER 6:¶48; ER 7:¶¶5, 6, 8, 10-13, 18; ER 8/8:T7:15-16.[11]

The Government Agents and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. ER 8/8:T8:13.[12] The Bergers were never

---

[10] The Bergers contend that Agent Scrafford neither requested nor received permission from them to enter their residence. ER 6:¶¶45-46; ER 7:¶¶5-6; 8/7:115:7-116:4. The entry was well after Mr. Berger had been informed that every structure on his ranch was covered by the Warrant and that he would be imprisoned if he did not cooperate.

[11] Mrs. Berger was in the house. At the time, she was 81 years old and also recently hospitalized in ill health. ER 7:¶17.

[12] Hamann is depicted on the videotape of the pre-search briefing soliciting and discussing with the Government Agents alternative ways to avoid detection of the Media by the Bergers.

advised that the Media had entered the Ranch with the aid of the Government Agents and were conducting a private search by videotaping and recording the search on the Bergers' land and in the various buildings. ER 7:¶¶5, 6, 8, 10-13, 18; ER 8/8:T8:13. The Bergers believed that the Media were Government Agents as they were all dressed in "street" clothes like the Government Agents and were indistinguishable from the law enforcement personnel. ER 7:¶¶11, 12; ER 8/8:T6:3. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. ER 7:¶¶5,10; ER 8/8:T8:13.

Government Agents helped the Media set-up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search. ER 8/5, 8/2, 8/8:T11:2-8.[13] Many intrusive outtakes of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." ER 8/2, 8/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted

---

These scenes were omitted from the written transcript provided by the Media. (ER 8/8) The Bergers offered the videotapes to the District Court by way of judicial notice under Fed. R. Evid. 201.

[13] The outtakes included on-camera interviews of Government Agents made at the Berger Ranch. During one lengthy interview, AUSA McLean made disparaging and personal remarks about Mr. Berger.

only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles.

Government Agents also helped the Media produce and promote the program. AUSA McLean breached his duties when he met with the Media numerous times during his confidential investigation and made confidential disclosures with the others, even on-camera with Hamann in an effort to do his "bit" for the environment. ER 1:¶¶35-44, 51-54, 74, 75; ER 8/8:T11:7-8. In addition, a few days before Mr. Berger's sentencing on the misdemeanor count, Agent Hanlon sent a letter on official Government stationery to "[a]ll participants in the Paul Berger (INV.4506AO) eagle poisoning investigations" announcing the broadcast schedule for the "Ring of Death" on Turner and CNN programs, "Earth Matters" and "Network Earth":

> the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD. . . . Japan, Chile, France, and every place in between.

ER 8/10. CNN and Turner channels broadcast the segment nationally and internationally at least ten (10) times through April 1994. ER 8/8T12:1-3; 8/9:4. It may still be being broadcast somewhere in the world today.

B. Basis for Federal Jurisdiction Below

The Bergers filed two related civil actions against the Media and Government Agents in the United States District Court in Montana for constitutional violations under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§ 2510, *et seq.*), state common law, declaratory and injunctive relief and monetary damages.[14] On February 26, 1996, the District Court dismissed all counts in favor of the Government Agents and Media. District Court jurisdiction was pursuant to Title 28 United States Code Sections 1331 and 1367(a).

The Bergers' Notice of Appeal was timely filed on March 5, 1996, conferring jurisdiction on the Court of Appeals under Title 28 United States Code Section 1291. As to the questions presented and for the reasons discussed below, the Ninth Circuit held that the Bergers' rights were violated by the unauthorized Media foray onto their private Ranch.

The Ninth Circuit held that the Bergers' Fourth Amendment rights were violated. The Ninth Circuit recognized that at the time of the search in March 1993 the Fourth Amendment violation was "clearly established" law, relying on *Ayeni v. Mottola*, 35 F.3d 680, 682-684 (2d

---

[14] The case against the Government Agents was initiated on March 21, 1995 (which included Media defendants Turner, Rainey and Hooper) and the First Amended Complaint was filed on May 16, 1995. The Bergers initially sued CNN and Hamann on March 24, 1994, filed the First Amended Complaint on March 21, 1995 and the Second Amended Complaint ("Complaint") on May 19, 1995.

Cir. 1994) (the law was "clearly established" in March 1992 that government officials cannot permit the media during searches), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F.Supp. 362 (E.D.N.Y. 1994); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (the law was "clearly established" in November 1992 that law enforcement cannot use a search warrant to facilitate private searches); and 18 U.S.C. § 3105 (prohibiting "any persons, other than law enforcement personnel and those assisting them from executing search warrants"). App. 11a-12a.

The Ninth Circuit properly refused to rely on the older, lower court decisions relied on by the District Court and by the Government Agents here, as inapposite. *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Ca. 1980); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Oh. 1984). App. 35a. The Ninth Circuit noted that those cases did not involve the Media "as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." App. 13a.

As to the Government Agents' conduct, the Ninth Circuit properly applied this Court's standard for qualified immunity in reversing the District Court and holding that the Agents were not immune from suit. App. 10a-11a (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The court concluded that "no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." App. 10a-11a (citing *Ayeni v. Mottola*, 35 F.3d at 686; *Buonocore*, 65 F.3d at 356; 18 U.S.C. § 3105). According to the Ninth Circuit, it was compelled to "heed the strictures on the potential abuse of law

enforcement powers" in applying the Fourth Amendment because:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

App. 9a-11a.

WHY THE GOVERNMENT AGENTS' PETITION SHOULD NOT BE GRANTED

Review of qualified immunity is not warranted where, as here, the Ninth Circuit properly applied the legal standard settled by this Court. The Government Agents are dissatisfied with the result of settled qualified immunity doctrine, claiming to contest the source of the law for determining when the constitutional right allegedly violated was "clearly established" under a qualified immunity analysis. Government Agents' Petition ("Gov/P") [at page] 10. The Government Agents propose that absent precedent from this Court, "a more restrained approach . . . would be to look to other lower courts that

have fairly addressed the specific actions at issue and to consider whether those precedents indicate any clear trend in the law demonstrating the patent unlawfulness of that conduct." Gov/P 10-13. The Government Agents' rationale is that the Agents "cannot be expected to predict the future course of constitutional law." Gov/P 12 (citing *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)).[15] The Government Agents' proposed approach, however, is irrelevant and was rejected by this Court long ago.

This Court has made clear that the restrictive application of the Fourth Amendment sought by the Government Agents is erroneous. *See Bivens*, 403 U.S. at 392-93 (this Court has consistently rejected an unduly restrictive view of the Fourth Amendment's protection against unreasonable searches and seizures such as the federal agents' thesis that invasion of privacy claims should be pursued in state court). Nor are factually similar cases required for determining when the law is "clearly established." *See United States v. Lanier*, 520 U.S. 259, 277 (1997) (holding that 18 U.S.C. § 242, like 42 U.S.C. § 1983 and *Bivens*, does not require the constitutional right allegedly violated to be first identified in a decision by this Court, or have been applied in a factual situation "fundamentally similar" to the one at bar). Furthermore, the Government Agents were never expected to predict the future as

---

[15] The Government Agents took this Court's admonition out of context by omitting the remainder of the statement that an official cannot be expected to predict the future, "but he will not be shielded from liability if he acts 'with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.' [citation omitted]." *Id.* at 563.

they argue, but were expected to conduct themselves with due regard to the constitutional rights they reasonably knew or should have known. *See Harlow*, 457 U.S. at 818.

This Court need not review the application here of this Court's precedents on qualified immunity. There is also no conflict between the decisions of the Courts of Appeals on the underlying constitutional question, the application of the Fourth Amendment to a conspiracy between Government Agents and the Media. Consequently, this Court's review is unwarranted.

I. THE NINTH CIRCUIT CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY STANDARD AND THE ONLY DISPUTE IS IN ITS RESULT

The sum of the dispute raised in the Government Agents' Petition is that the Government Agents were entitled to immunity because "no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful" and there were lower court decisions which upheld the lawfulness of the Agents' conduct. Gov/P 11 (emphasis in original). The Government Agents' arguments do not support review.

That the Ninth Circuit correctly applied this Court's qualified immunity standard cannot legitimately be disputed. According to this Court, government officials performing discretionary functions are not immune from liability for civil damages if their conduct violated a "clearly established statutory or constitutional right of

which a reasonable person would have known." *See Harlow*, 457 U.S. at 818 (an action for damages may be the only realistic avenue for vindication of constitutional guarantees when government officials abuse their offices); *Anderson v. Creighton*, 483 U.S. 635 (1987). Preexisting precedent on point is not required:

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful [citation omitted], but it is to say that in light of the preexisting law the unlawfulness must be apparent.

Id. at 640; *see Mitchell v. Forsyth*, 472 U.S. 511 (1985);[16] *see also Shoshone-Bannock Tribes v.*

---

[16] The Government Agents' reliance on *Mitchell* does not support review. Gov/P 11. Forsyth sued U.S. Attorney General John Mitchell who, on behalf of the President, authorized a warrantless wiretap to investigate threats to national security by an anti-war group after this Court held in *United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 322-23 (1972), that such conduct was unlawful. *Mitchell*, 472 U.S. at 515-16. Unlike here, where the Fourth Amendment restricts search warrants to protect privacy (*Katz v. United States*, 389 U.S. 347 (1967)) and federal agents are prohibited from allowing unauthorized private persons during searches (18 U.S.C. § 3105), the legality of warrantless national security wiretaps was never doubted since President Roosevelt authorized wiretaps of suspected subversives in the 1940's (*Mitchell*, 472 U.S. at 532) and the unpublished cases cited by the Government were in accord. Thus, unlike the privacy rights being enforced here, the unlawfulness of the warrantless national security wiretap was not established until after Mitchell placed the wiretap. *Id.* at 536.

Fish & Game Comm'n, Idaho, 42 F.3d 1278 (9th Cir. 1994).[17] App. 10a.

To determine that constitutional rights are "clearly established" the analysis begins by looking for Supreme Court and Ninth Circuit precedent. *Kirkpatrick v. Los Angeles*, 803 F.2d 485, 490 (9th Cir. 1986). Absent such precedent, the Ninth Circuit's approach is that,

> We begin by looking at those cases that are "most like" the instant case. . . . In the "absence of binding precedent," we look to all available decisional law. [citation omitted] This includes cases from state courts, other circuits and district courts.

Figueroa v. United States, 7 F.3d 1405, 1409 (9th Cir. 1993); *Backlund v. Barnhart*, 778 F.2d 1386, 1389-90 (9th Cir. 1985) ("on point" precedent to defeat qualified immunity not necessary because "[t]here may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation"); *see Ostlund v. Bobb*, 825 F.2d 1371, 1374 (9th Cir. 1987) (Ninth Circuit applied case law that occurred three years *after* the complaint was filed arguing that defendants "cannot use the absence of case law directly on point to shield them from liability").

---

[17] Ninth Circuit analysis of qualified immunity is a 3-part test: (1) identification of the right allegedly violated, (2) whether the right was clearly established so that a reasonable official would have been aware of it and, (3) whether a reasonable official could have believed that the conduct at issue was unlawful. *Shoshone-Bannock Tribes*, 42 F.3d at 1285-86; *Sloman v. Tadlock*, 21 F.3d 1462, 1467 (9th Cir. 1994) (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991)). This analysis is in full compliance with this Court's decisions.

The constitutional rights sought to be enforced here under the Fourth Amendment were established long ago to protect the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . . " *See Soldal v. Cook County*, 506 U.S. 56, 61 (1992); *see Boyd v. United States*, 116 U.S. 616, 630 (1886). The Fourth Amendment has also long required that when government invades a person's privacy by executing a search the interruption must be minimal. *See Bivens*, 403 U.S. at 395 n.7 (citing *Marron v. United States*, 275 U.S. 192, 196 (1927)); *see Katz v. United States*, 389 U.S. 347, 353-57 (1967) (the Fourth Amendment warrant requirement is intended to protect a person's reasonable expectation of privacy).

The Ninth Circuit correctly looked to pre-existing case law on point in deriving its reasoned conclusion. App. at 10a-11a. When in March 1992, a Secret Service agent allowed a CBS camera crew to videotape and record a search in *Ayeni v. CBS Inc.*, the District Court denounced that conduct and denied qualified immunity on the ground that a private home is not a soundstage for law enforcement theatricals and held that the agent's conduct was "so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution. . . . " *Ayeni v. CBS Inc.*, 848 F. Supp. at 368. The Government Agents knew that the Media should not enter the Berger Ranch during the search but allowed them to enter, ER 5/7:37:2-13 (Scrafford testimony); 8/7:37, 115. *See Bivens*, 403 U.S. at 394 n.7.

The Ninth Circuit properly refused to consider the older, lower court and unpublished decisions relied on by the Government Agents and District Court.[18] Govt/P 11; App. 35a. These cases have no constitutional force and effect as they did not recognize a Fourth Amendment privacy right which this Court has clearly upheld in superseding decisions. *See Winston v. Lee*, 470 U.S. 753, 758-762 (1985) (recognizing that the Fourth Amendment protects expectations of privacy); *see, e.g., Soldal v. Cook County*, 506 U.S. at 61 (Fourth Amendment protection against unreasonable searches and seizures applies in civil cases even if no invasion of privacy is alleged). Moreover, these cases have no precedential value and do not "clearly establish" the law. *See Woodward v. Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992); *see also Fox v. Acadia State Bank*, 937 F.2d 1566, 1570 (11th Cir. 1991). Further, the Ninth Circuit distinguished these unreported decisions as considering passive government and press conduct quite different from that occurring here.

---

[18] The Government Agents' reliance on these cases is unavailing. *See Higbee*, 5 Med. L. Rptr. at 2372 (turned on a restrictive characterization of the privacy right); *Moncrief*, 10 Med. L. Rptr. at 1620 (erroneously held that a constitutional wrong required violation of a *non*-4th Amendment privacy right (*e.g., Roe v. Wade*, 410 U.S. 113 (1973)); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (1980) (issue was limited to whether a reasonable search and seizure, without more, is made unreasonable when the media shows up to film where there is no agreement with or participation of law enforcement); *Avenson v. Zegart*, 577 F.Supp. 958, 962 (D. Minn. 1984) (14th Amendment claim for equal protection not valid constitutional violation where invidious, class-based discrimination was not and could not be alleged).

The Ninth Circuit also looked to analogous cases. *See Buonocore v. Harris*, 65 F.3d at 356 (in November 1992 it was "clearly established" that the Fourth Amendment prohibits government agents from using a search warrant to facilitate a private telephone company employee's independent search of another's home for items not specified in the warrant); *see also Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (1981) (allowing the media to trespass would amount to a "general warrant equivalent to the writs of assistance which were so odious to the American colonists."). *See also Bills v. Aseltine*, 958 F.2d 697, 704 (6th Cir. 1992) (whether allowing a private person not assisting with the search to photograph premises was an unreasonable search is a jury question in case where private party who photographed items during search was not named in the § 1983 action).[19]

The Ninth Circuit, like the district court and Second Circuit in *Ayeni v. Mottola*, looked to federal statutes for guidance as well. App. 11a. Section 3105 of Title 18, United States Code, is one of a number of statutes restricting those who may be present during the execution of search warrants.[20] Cases construing § 3105 establish that the statute permits only designated officers and

---

[19] The Ninth Circuit also noted *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996), which allowed the media's presence because the search warrant itself authorized photography and videotaping and which also held that the law was not "clearly established" at the time the search occurred in July 1991. App. 12a.

[20] *See* Title 18, Sections 3109 (knock and announce requirement limits the use of force to enter a private dwelling); 2234 (criminalizes willful exceeding of search warrant authority); 2236 (criminalizes the warrantless search of a private dwelling); and Rule 41, Federal Rules of Criminal Procedure,

others providing required assistance in the execution of the warrant to be present. *See Ayeni v. Mottola*, 35 F.3d at 687; *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (telephone company employees authorized by search warrant to help identify stolen property); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982) (state drug enforcement officer asked to assist in execution of federal drug search warrant); *United States v. Schwimmer*, 692 F.Supp. 119, 126-27 (E.D.N.Y. 1988) (private computer expert authorized by search warrant to locate computer files).[21]

For an Assistant United States Attorney and experienced federal agents to claim that they did not need to comply with either Section 3105 or the restrictions of the warrant beggars the imagination.[22] Not surprisingly, the

---

regulates the issuance and execution of search warrants and provides an additional basis for interpreting the Fourth Amendment's reasonableness requirement.

[21] Other federal appellate cases illustrate the consequences of allowing unauthorized persons during searches. *See United States v. Sanchez*, 509 F.2d 886, 889 (6th Cir. 1975) (explosives found during warrantless search by federal Alcohol, Tobacco and Firearms agent suppressed when he entered premises with state police under search warrant for narcotics only); *United States v. Warren*, 550 F.2d 219, 225 (5th Cir. 1977) (evidence found during warrantless search by federal Drug Enforcement Agency agents suppressed based on unauthorized boarding of ship under Coast Guard authority only to make safety inspections).

[22] Nor can the Government Agents feign ignorance of their express duty to refrain from disclosing to the Media private facts about the Bergers and the confidential investigation of Mr. Berger. Department of Justice ("DOJ") personnel are specifically prohibited from disclosing such information to the media during an investigation, especially "subjective observations"

court found that the Government Agents were not authorized by the Magistrate Judge issuing the search warrant to allow the Media to join the search of the Berger Ranch. The Government Agents had never even claimed that they required the assistance of the Media pursuant to Section 3105. The Ninth Circuit then applied the law of qualified immunity as defined by this Court. There is no necessity for this Court to review that application of settled law.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE LAW GOVERNING THE CONSTITUTIONAL ISSUE

The threshold constitutional issue presented involves Fourth Amendment restrictions on Government Agents' authority to invade individual privacy while in pursuit of law enforcement objectives. *See Marron*, 275 U.S. at 196; *Katz*, 389 U.S. at 355-57. The presence of private parties during law enforcement activities has long been

---

about the character of persons under investigation, or references to investigative procedures, witnesses or evidence, or any opinion as to the person's guilt, where release "tends to create dangers of prejudice without serving any law enforcement function" and "could reasonably be expected to be disseminated by means of public communication." *See* 28 C.F.R. § 50.2(b)(1)-(6). The DOJ personnel are under an "obligation to preserve the privacy rights of our citizens, even though they may be under investigation for violation of the criminal laws." *See Department of Justice Manual*, 1-7.001 at 1-285 (1990-1 Supp.) ("Favoritism should be shown to no member of the media"); 1-7.000 (1993 Supp.). The Privacy Act imposes criminal sanctions for the willful disclosure of such information without written consent or court order. *See* 5 U.S.C. § 552a.

restricted unless authorized. *See* 18 U.S.C. § 3105; *Clouston*, 623 F.2d at 486-87; *Wright*, 667 F.2d at 797; *Ayeni v. Mottola*, 35 F.3d at 687. And where "state action" is demonstrated private parties are liable for constitutional violations. *See Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983).

The older, lower court decisions relied on by the Government Agents which in the past found that the media's presence was not unlawful are of no consequence to the analysis where no Fourth Amendment privacy right was recognized or no "state action" was alleged. Gov/P 18. *See supra* at n. 17. These superseded and unpublished decisions have no precedential value. *See Winston*, 470 U.S. at 758-762; *Woodward*, 977 F.2d at 1397. These invalidated, unreported decisions do not create a conflict of law.

Other cases relied on by the Government also do not support review. The Fourth Circuit's decision in *Wilson v. Layne*, 141 F.3d 111, 1998 U.S. App. LEXIS 6863 (4th Cir. 1998) (en banc), and the Eighth Circuit's decision in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997), appear to dispute the Second Circuit in *Ayeni v. Mottola*, but are distinguishable and do not support a conflict of law. The *Wilson* court refused to follow this Court's clear authority and to decide the threshold constitutional issue which is part of the requisite analysis. *Wilson*, 1998 U.S. App. LEXIS 6863 at *23; *Siegert v. Gilley*, 500 U.S. 226, 232-23 (1991) (determination of the constitutional right is a threshold question); *Mitchell*, 472 U.S. 511; *Harlow*, 457 U.S. 800; *see also Shoshone-Bannock Tribes*, 42 F.3d 1278. Thus, *Wilson* is not in conflict with *Ayeni v. Mottola* and *Berger* on the reach of the Fourth Amendment

as the Fourth Circuit failed to decide the issue. Further, *Wilson* does not involve the active conduct present here.

Unlike this case, there were no allegations of "state action" in *Parker* from which to conduct an appropriate constitutional analysis. The District Court held not only that plaintiffs had not made allegations of concerted action by the press and police but also that the plaintiffs failed to offer any evidence of "any affirmative agreement." *Parker v. Clarke*, 905 F.Supp. 638, 642 (E.D. Mo. 1995), *aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1081 (1997). That case was not inconsistent with the Ninth Circuit's application of law; it just reached a different conclusion. Despite the majority's discussion, the underlying facts do not create a true conflict with the holding in this case. With the *Parker* court finding neither an agreement nor active conduct, *Parker* does not present a true conflict with the Ninth Circuit here.[23]

The Government Agents' reliance on the criticism of *Ayeni v. Mottola* in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), for failing to narrowly define the constitutional right allegedly violated, does not support restricting application of the Fourth Amendment here. Gov/P 13. This Court has long refused to restrict the protections afforded by the Fourth Amendment and there is no specificity requirement for alleging a constitutional violation even if "the very action in question has [not] previously been held unlawful." *Lanier*, 520 U.S. at 267 (citing *Anderson*, 483 U.S. at 640); *see Bivens*, 403 U.S. at 392-93. There is no clear conflict among the Courts of Appeals.

[23] Had the Eighth Circuit in *Parker v. Boyer* conducted the appropriate analysis it would have found, as the dissent pointed out, that the defendant news crew "acted in concert with the police" as "willful participant[s]" insofar as they contacted the police and solicited an invitation to join the police, were invited by a police sergeant and "came to the location with the police [in the police car] and could not have entered if the police had not done so first." *Id.* at 449. The police chief even testified that the media's conduct was unlawful where allowing the press to join a police search would constitute a trespass. *Id.* at 447. Even if there was a full inquiry, the *Parker v. Boyer* case is factually dissimilar based on the amount of evidence presented here.

CONCLUSION

For the reasons set forth in this opposition, the Bergers respectfully submit the Government Agents' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HENRY H. ROSSBACHER*
NANCI E. NISHIMURA
TRACY W. YOUNG
DAVID F. DESMOND
ROSSBACHER & ASSOCIATES
Union Bank Plaza, 24th Floor
445 South Figueroa Street
Los Angeles, California 90071
(213) 895-6500

JAY F. LANSING, ESQ.
MOSES LAW FIRM
The Terrace – Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103
(406) 248-7702

Counsel of Record — Counsel for Respondents

(3)

FILED
AUG 14 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD A. CORDRAY
Counsel of Record
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

10 pp

QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly ruled that law enforcement officers violated clearly established law, and thus were not entitled to qualified immunity, when at the time they acted there was no decision by the Supreme Court or any other court so holding, and the only three decisions of lower courts addressing this issue had found that the same conduct did not violate the law?

2. Whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

REPLY BRIEF FOR PETITIONERS 1

CONCLUSION 6

TABLE OF AUTHORITIES

PAGE

Cases

Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984) 3
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995) 4
Davis v. Scherer, 468 U.S. 183 (1984) 4
Elder v. Holloway, 510 U.S. 510 (1994) 4
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3
Higbee v. Times-Advocate, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) 3
Hunter v. Bryant, 502 U.S. 224 (1991) (per curiam) 3
Mitchell v. Forsyth, 472 U.S. 511 (1985) 2, 3
Moncrief v. Hanton, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) 3
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997) 4
Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980) 3
Procunier v. Navarette, 434 U.S. 555 (1978) 4
Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) (en banc), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 7, 1998) (No. 98-83) 4, 5

Constitutional Provisions, Statutes, and Regulations

U.S. CONST. amend. I 5
U.S. CONST. amend. IV 5

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

Respondents seek to characterize the petition as raising only pedestrian questions about the application of settled law in specific cases. Opp. 13-15. But they never manage to explain how the decision below can be reconciled with controlling precedent from this Court, nor do they successfully dispel the clear split between the Second and Ninth Circuits, on the one hand, and the Eighth and Fourth Circuits, on the other, which those courts themselves have noted in recent opinions. Finally, respondents do not contest the importance of the qualified immunity issues raised squarely and cleanly in the petition, which implicate both effective law enforcement and public oversight of it in first-hand reports by the media and the press.

As stated at more length in the petition, *see* Pet. 10-15, this case raises an issue that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: when there is no binding authority from the Supreme Court or the Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question so as to invalidate a defense of qualified immunity, what weight (if any) is to be given to the decisions of other courts on the specific issue at stake? In particular, where other courts had held that essentially the same conduct was *lawful* at the time, is it proper for a court to reject a defense of qualified immunity and can such a ruling be squared with the Court's precedents? Respondents seek to wish the question away by contending that lower court decisions that are unpublished are not binding law. Opp. 19. This position, however, is obviously troubling in its own right and, in any event, fails to respect this Court's holding in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which explicitly determined that two unpublished lower court decisions upholding the legality of specific conduct sufficed to demonstrate that the law was not "clearly established" to the contrary at that time. *Id.* at 533.[1]

Respondents would have the Court believe that though the lower courts by now are quite aware of the basic parameters of qualified immunity doctrine -- that the law must be "clearly established" at the time of the pertinent conduct to forfeit the immunity defense; that subsequent cases are not to be taken into account in ascertaining such "clearly established" law; that the rights in question must be defined at a fairly specific level of generality; and that courts are to begin with precedents from the Supreme Court and the relevant Court of Appeals in identifying what law is "clearly established" -- no further disputes ever arise in this area that are worthy of plenary review. This case,

[1] Respondents attempt to distinguish *Mitchell* by asserting that the law was more "clearly established" in that case than it was here. Opp. 16 n.16. But the foundation for the Court's analysis in *Mitchell* was, as it should have been here, that two lower federal courts had upheld the lawfulness of such conduct in prior unpublished decisions. *See* 472 U.S. at 533. There is no other material point of distinction between the two cases.

however, and many others recently granted and resolved by this Court, repudiate this notion. Indeed, the Court recently granted summary reversal of another Ninth Circuit decision that distorted the proper qualified immunity analysis, *see Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam), and the same result is warranted in this case.

Here the Ninth Circuit purported to throw out petitioners' defense of qualified immunity based on the observation "that no circuit decision has ever upheld the constitutionality" of their conduct. Pet. App. 11a-12a. This was fundamental error. More germane to the proper inquiry was that at the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. The District Court analyzed the issue correctly, *see* Pet. App. 34a, but the Court of Appeals simply ignored its reasoning to upset its result. Indeed, the Ninth Circuit shunted aside a consistent string of lower court decisions that had upheld the lawfulness of such conduct in virtually the same circumstances, which should have been dispositive. *See Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984); *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). *See also Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984) (same holding on equal protection claim). Respondents fabricate distinctions in an attempt to deride these decisions, but none supplies the clear defect of the Ninth Circuit's upside-down analysis on the qualified immunity issue.

As noted in the petition, the Court has previously declined to decide when and in what circumstances lower court decisions can resolve the central question of whether the law was "clearly established" one way or the other for qualified immunity purposes, and the issue has not received consistent treatment by the federal courts of appeals. *See* Pet. 12-13 & n.2 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). By applying the approach taken in *Mitchell*, however, the Court could reaffirm that where no controlling authority clearly establishes the law one way or the other, and the corpus of decisions from

other jurisdictions tends to confirm that the law was either unsettled or was settled in favor of the validity of such conduct, the defense of qualified immunity must be upheld. *See also Procunier v. Navarette*, 434 U.S. 555, 563-65 & nn.8-10 (1978) (same); *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (same). Only by that means can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and act accordingly. *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

Respondents also unconvincingly assert that the lower courts are not divided on the precise issue posed in this case: whether law enforcement officers violate clearly established law under the Fourth Amendment, thus invalidating their defense of qualified immunity, when they allow members of the news media to accompany them and report on their conduct in properly executing a valid warrant. *See* Opp. 23-24. To the contrary, as detailed in the petition, the Ninth Circuit has sided with the Second Circuit, against the Eighth and Fourth Circuits, by rejecting the defense of qualified immunity raised by petitioners here. *See* Pet. 16-22.

Respondents argue that the ruling in *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (en banc), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 7, 1998) (No. 98-83), does not create a conflict because there the Fourth Circuit "refused to follow this Court's clear authority." Opp. 23. Respondents go on to raise the red herring that "*Wilson* is not in conflict with *Ayeni v. Mottola*[, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995),] or *Berger* on the reach of the Fourth Amendment as the Fourth Circuit failed to decide the issue." Opp. 23-24. Perhaps that is so, but the clear conflict among these cases is on the qualified immunity issue itself -- a point that respondents do not even contest. In addressing *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), respondents weakly suggest that the Eighth Circuit "just reached a different conclusion," Opp. 24, but in the next breath they argue that the court would have reached the same conclusion had it "conducted the appropriate analysis," *id.* at 24 n.23 -- a classic, if unwitting, acknowledgment that there is a

square conflict both in result and in reasoning between these decisions.

A more candid assessment, which reinforces this same recognition of a direct circuit split, was rendered by Judge Murnaghan writing separately in the *Wilson* case, where he observed that "[t]he majority's *en banc* opinion adds our Circuit's voice to the split between the Second and Ninth Circuits on the one hand and the Eighth Circuit on the other. Given the prevalence of real-life police dramas on television, other circuits will face this question soon enough." *Wilson*, 141 F.3d at 132 (Murnaghan, J., dissenting).

This observation underscores the significance of these issues for effective law enforcement, which is enhanced when its activities are reported to the public regularly and accurately. In *Wilson*, the Fourth Circuit correctly stated that "a legitimate function of law enforcement [is] to facilitate accurate reporting on law-enforcement activities and to improve public oversight of those activities by use of the press. These efforts are important because *both* the deterrence of crime *and* the deterrence of improper conduct by law-enforcement officers are vital to the broader mission." *Wilson*, 141 U.S. at 118 (quotations omitted). Until the circuit split on the qualified immunity issue is resolved, however, law enforcement officers operating within the bounds of the Ninth and Second Circuits will be forced to execute warrants in secret if they wish to avoid being sued personally for money damages. The resulting closed regime of law enforcement operations would be antithetical to the core principles embodied in both the First and Fourth Amendments. For these reasons, either summary reversal or a grant of *certiorari* is warranted in this case.

CONCLUSION

Petitioners respectfully request that the decision of the Ninth Circuit be summarily reversed in this case. In the alternative, the petition for a writ of *certiorari* should be granted and the case set for plenary review on the merits of the qualified immunity issue.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioner

August 1998

(13)

97-1927

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT APPENDIX

HENRY H. ROSSBACHER
Counsel of Record
445 South Figueroa Street
Los Angeles, California 90071
(213) 895-6500
(213) 895-6161 (fax)

Attorney for Respondents

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661
(614) 539-9333 (fax)

Attorney for Petitioners

PETITION FOR WRIT OF CERTIORARI FILED MAY 26, 1998
CERTIORARI GRANTED NOVEMBER 9, 1998

138 pp

TABLE OF CONTENTS

PAGE

Chronological List of Relevant Docket Entries 1

Search Warrant (Mar. 18, 1993) 17

Application and Affidavit (Mar. 18, 1993) 19

Order Unsealing Search Warrant (Apr. 2, 1993) 27

First Seizure Warrant (Mar. 18, 1993) 28

Application and Affidavit (Mar. 18, 1993) 30

Order Unsealing Seizure Warrant (Apr. 2, 1993) 35

Second Seizure Warrant (Mar. 18, 1993) 36

Application and Affidavit (Mar. 18, 1993) 38

Order Unsealing Seizure Warrant (Apr. 2, 1993) 43

First Amended Complaint (May 16, 1995) 44

Exhibit A: Letter Agreement Between United States Attorney's Office for the District of Montana and CNN 90

Affidavit of Paul Berger (Aug. 26, 1995) 92

Plaintiffs' Response to Federal Defendants' Statement of Uncontroverted Facts, Statement of Genuine Issues and Additional Uncontroverted Facts in Support of Opposition to Motion to Dismiss or in the Alternative for Summary Judgment (Aug. 29, 1995) 97

TABLE OF CONTENTS (continued)

PAGE

[Exhibit 2 to Affidavit of Jay F. Lansing (Aug. 29, 1995)]:
CNN Producer Package Checklist: Story Setup Packet .. 131

Memorandum and Order by the United States
District Court for the District of Montana
(Feb. 26, 1996) ..... Pet. App. 27a

Opinion by the United States Court of Appeals
for the Ninth Circuit (Nov. 13, 1997) ..... Pet. App. 1a

Order Denying Rehearing and Rehearing En Banc
by the United States Court of Appeals for
the Ninth Circuit (Feb. 25, 1998) ..... Pet. App. 48a

Order Granting Motion to Stay the Mandate
Pending Filing of a Petition for Certiorari
by the United States Court of Appeals
for the Ninth Circuit (Mar. 13, 1998) .... Pet. App. 50a

Order Granting Certiorari (Nov. 9, 1998) 135

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

TERMED APPEAL

U.S. District Court
U.S. District Court of Montana (Billings)
CIVIL DOCKET FOR CASE #: 95-CV-46

Berger, et al v. Hanlon, et al — Filed: 03/21/95
Assigned to: Judge Jack D. Shanstrom — Jury Demand: Both
Demand: $0,000 — Nature of Suit: 440
Lead Docket: None — Jurisdiction: Federal Question
Cause: 28:1331 Federal Question: Other Civil Rights

RELEVANT DOCKET ENTRIES FROM THE DISTRICT COURT

3/21/95	1	COMPLAINT - Original and copy(s) 11 (Summons (es) issued) handed 11 origs & 2 of each to: runner for pltf for service (snyb) [Entry date 03/31/95]
3/21/95	3	AFFIDAVIT of Jay Lansing re [2-1] (snyb) [Entry date 03/31/95]
5/16/95	15	AMENDED COMPLAINT [1-1] (FIRST AMENDED COMPLAINT FOR DAMAGES FOR THE VIOLATIONS OF THE UNITED STATES CONSTITUTION (fourth amendment), CONSPIRACY, TRESPASS, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, CONVERSION, FOR DECLARATORY JUDGMENT AND

INJUNCTION, AND FEDERAL WIRETAP STATUTE) by plaintiff Paul W. Berger, plaintiff Erma R. Berger; jury demand (sls) [Entry date 05/19/95]

7/12/95 30 ANSWER by defendant Turner Broadcasting, defendant Robert Rainey, defendant Donald Hooper to [15-1] which is the first amended complaint (snyb) [Entry date 07/13/95]

7/21/95 31 MOTION by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean to dismiss, or in alternative for summary judgment (snyb) [Entry date 07/25/95]

7/21/95 32 STATEMENT of uncontroverted facts by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean in support of [31-1], in support of {31-2] (snyb) [Entry date 07/25/95]

7/21/95 33 DECLARATION of Rodney Hanlon by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean re [31-1], re [31-2] (snyb) [Entry date 07/25/95]

7/21/95 34 NOTICE Of Request for Judicial Notice by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean (snyb) [Entry date 07/25/95]

7/21/95 37 NOTICE of Substitution of Party USA for deft Kris McLean by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean (snyb) [Entry date 07/25/95]

8/3/95 39 RESPONSE by plaintiff Paul W. Berger, plaintiff Erma R. Berger to [37-1], to [35-1] certification and substitution (slp) [Entry date 08/10/95]

8/4/95 40 MEMORANDUM/BRIEF by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean in support of motion to dismiss [31-1], of motion for summary judgment [31-2] (slp) [Entry date 08/10/95]

8/11/95 41 ORDER by Judge Jack D. Shanstrom granting notice [37-1] that United States has been substituted in place of deft Kris McLean with respect to plaintiffs' Third Cause of Action and plaintiffs' Third Cause of Action is hereby Dismissed as to Deft Kris McLean; also ordered that caption in this action shall be amended to reflect the addition of the United States as an additional party (cc: all counsel) (slp)

8/11/95 42 MOTION by defendant USA to dismiss (slp)

8/11/95 43 MEMORANDUM/BRIEF by defendant USA in support of motion to dismiss [42-1] (slp)

8/11/95 44 RESPONSE by plaintiff Paul W. Berger, plaintiff Erma R. Berger to motion to dismiss [42-1] (slp)

816/95 46 AFFIDAVIT of Jay F Lansing re [45-1] (rmw)

8/28/95 48 MOTION by defendant Turner Broadcasting, defendant Robert Rainey, defendant Donald Hooper for summary judgment (rmw) [Entry date 08/29/95]

8/28/95 49 MEMORANDUM/BRIEF by defendant Turner Broadcasting, defendant Robert Rainey, defendant Donald Hooper in support of motion for summary judgment [48-1] (rmw) [Entry date 08/29/95]

8/28/95 50 STATEMENT of Uncontroverted facts by defendant Turner Broadcasting, defendant Robert Rainey, defendant Donald Hooper in support of [48-1] (rmw) [Entry date 08/29/95]

8/29/95 51 RESPONSE in opposition by plaintiff Paul W. Berger, plaintiff Erma R. Berger to motion to dismiss [42-1], to motion to dismiss [31-1], to motion for summary judgment [31-2] (snyb) [Entry date 08/30/98]

8/29/95 52 RESPONSE by plaintiff Paul W. Berger, plaintiff Erma R. Berger to [50-1] which is Statement of Uncontroverted Facts of defts' and also attached is the Pltfs' Statement of Genuine Issues and Addtl Uncontroverted facts in sup. of Oppo to Mot. Dism & for SJ of Defts. (snyb) [Entry date 08/30/95]

8/29/95 53 AFFIDAVIT of Paul W. Berger (snyb) [Entry date 08/30/95]

8/29/95 54 AFFIDAVIT of Jay Lansing with attachments and in separate expando due to size (snyb) [Entry date 08/30/95]

8/30/95 55 RESPONSE by plaintiff Paul W. Berger, plaintiff Erma R. Berger to Federal Defendants Request for Judicial Notice. (snyb)

9/12/95 56 RESPONSE in opposition by plaintiff Paul W. Berger, plaintiff Erma R. Berger to motion for summary judgment [48-1], to motion to dismiss [42-1], to motion to dismiss [31-1], to motion for summary judgment [31-2] (snyb) [Entry date 09/13/95]

9/12/95 57 RESPONSE by plaintiff Paul W. Berger, plaintiff Erma R. Berger to [50-1] which is Media defts' statement of uncontroverted facts, stmt of gen. issues and addtl uncontroverted facins in sup of oppo. to M/Dism or for SJ. (snyb) [Entry date 09/13/95]

9/12/95 58 AFFIDAVIT of Paul W. Berger (snyb) [Entry date 09/13/95]

9/12/95 59 AFFIDAVIT of Jay Lansing (snyb) [Entry date 09/13/95]

9/18/95 60 REPLY by defendant Rodney C. Hanlon, defendant Joel Scrafford, defendant Richard C. Branzell, defendant Robert Prieksat, defendant Kris A. McLean, defendant Turner Broadcasting, defendant Robert Rainey,

defendant Donald Hooper, defendant USA to response to motion for summary judgment [48-1], motion to dismiss [42-1], motion to dismiss [31-1], motion for summary judgment [31-2] file delivered to: Judge Shanstrom (snyb) [Entry date 09/20/95]

10/2/95 63 REPLY by defendant Turner Broadcasting, defendant Robert Rainey, defendant Donald Hooper to response to motion for summary judgment [48-1] file delivered to: shelf (rmw) [Entry date 10/3/95]

11/28/95 65 NOTICE OF SUBMISSION OF ADDITIONAL AUTHORITY BY plaintiff Paul W. Berger, plaintiff Erma R. Berger in support of their position that the defts are not entitled to qualified immunity (rmw)

12/6/95 66 MINUTES: of time set for hearing on Pending Motions & cos are present & ready to proceed & ctr hears argument & taking under advisement on 12/6/95 the motion for summary judgment [48-1], taking under advisement on 12/6/95 the motion to dismiss [42-1], taking under advisement on 12/6/95 the motion to dismiss [31-1], taking under advisement on 12/6/95 the motion for summary judgment [31-2] before Judge Jack D. Shanstrom C/R: R Mattson & Dept R. Weiss (rmw)

12/15/95 67 ORDER by Judge Jack D. Shanstrom granting motion to dismiss [42-1] which is the USA's Motion to Dismiss plaintiff's third cause of action, namely trespass. This motion dismissed

without prejudice. (cc: all counsel) (mjm) [Entry date 12/18/95]

12/20/95 68 ORDER by Judge Jack D. Shanstrom regarding [67-1] which is the Court's order dated 12/15/95 and is amended to read as follows: It is ordered that the US' motion to dismiss is granted. Plaintiff's third cause of action against the US, namely trespass, is dismissed without prejudice. (cc: all counsel) (jwg)

2/14/96 69 MOTION by plaintiff Paul W. Berger, plaintiff Erma R. Berger for order setting Prelim PT Conf (rmw)

2/26/96 70 MEMORANDUM, OPINION, AND ORDER: by Judge Jack D. Shanstrom finding the Pltf's motion for order setting Prelim PT Conf [69-1] moot., granting Federal Defts' motion to dismiss [31-1], granting Media Defts' motion for summary judgment [31-2] and terminating case (cc: all counsel) (snyb)

2/26/96 71 JUDGMENT: Judge Jack D. Shanstrom regarding [70-1], [70-2] which is the Memo/Order and placed in Judgment Book #65 and Page #2764 with copy of Memo/Order attached. (cc: all counsel) (snyb)

3/5/96 74 NOTICE OF APPEAL by plaintiff Paul W. Berger, plaintiff Erma R. Berger, from Dist. Court decision, [70-2] Fee Status/Amount - aid $105.00 Receipt #11768 (cc: all counsel) (snyb)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 96-35251 Filed: 3/8/96
Nsuit: 3440 Other civil rights (Fed)
Berger, et al v. Hanlon, et al
Appeal from: District of Montana (Billings)

RELEVANT DOCKET ENTRIES IN THE COURT OF APPEALS

3/14/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y. setting schedule as follows: CADS is due 3/21/96; appellant's designation of RT is due 3/15/96; appellee's designation of RT is due 3/25/96; appellant shall order transcript 4/4/96; court report shall file transcript in DC by 5/6/96; certificate of record shall be filed by 5/13/96; appellant's opening brief is due 6/21/96; appellees' is due 7/22/96; appellants' reply brief is due 8/5/96; [96-35251] (ft) [96-35251]
4/2/96	Filed certificate of record on appeal RT filed in DC 3/27/96 [96-35251] (mhf) [96-35251]
4/2/96	Filed Appellant Paul W. Berger, Appellant Erma R. Berger motion to expedite appeal. (WIP PER PROMO) [96-35251] served on 3/28/96. [96-35251] (sf) [96-35251]

4/9/96	Filed PROMO order (Deputy Clerk: cag) Aplt's opposed mot for an expedited briefing schedule and priority calendaring is granted as follows: the opening brief and excerpts of record are due 5/1/96, the ans brief is due 5/31/96, and the reply brief is due 14 days from service of the ans brief. This appeal shall be placed on the next available calendar upon completion of briefing. [96-35251] (tsp) [96-35251]
5/3/96	Filed original and 15 copies of Appellant Paul W. Berger Appellant Erma R. Berger opening brief (Informal: n) 39 pages and five excerpts of record in 2 volumes; served on 5/1/96 [96-35251] (sf) [96-35251]
6/3/96	Filed original and 15 copies appellee Turner Broadcasting, Robert Rainey, Donald Hooper in 55 pages brief, 0 Exc. vols: served on 5/31/96 [96-35251] (sf) [96-35251]
6/13/96	Filed motion and PROMO deputy clerk order: (Deputy Clerk: cg) Aplt's motion to file consolidated joint oversize brief in these appeals is denied. Aplt's motion to set one hearing date for both numbers is granted as follows: These appeals shall be calendared together if possible. in 96-35251, 96-35266 (Motion recvd 6/12/96) [96-35251, 96-35266] (sf) [96-35251 96-35266]
6/17/96	Filed original and 15 copies of appellee Rodney C. Hanlon, Joel Scrafford, Richard C. Branzell, Robert Prieksat, Kris A. McLean 28 pages brief, 0 Exc. vols; served on 6/14/96 [96-35251] (sf) [96-35251]

6/21/96 Filed, as of 4/2/96, certified record on appeal in 1 Vols. (total): -0- Clerks Rec 1 Rts (ORIGINAL) [96-35251] [96-35251] (mhf) [96-35251]

7/15/96 CALENDARED: Seattle Sept 19 1996 9:00 a.m. Courtroom Park Place, 21st Flr [96-35251, 96-35266] (th) [96-35251 96-35266]

7/22/96 Received orig and 15 copies Paul W. Berger in 96-35251, Erma R. Berger in 96-35251, Paul W. Berger in 96-35266, Erma R. Berger in 96-35266's reply brief (Informal: n) of 20 pages served on 7/15/96 deficient motion pending to file joint brief. [96-35251, 96-35266] (ft) [96-35251 96-35266]

8/16/96 Filed CNN AND Jack Hamann motion for allowance of additional oral argument time (PANEL) [96-35266] served on 8/13/96. (sf) [96-35251 96-35266]

8/20/96 Filed Appellants response Media Aples' mtn for allowance of additional oral argument time, stating they do not oppose but requests they do be allowed equal time. served on 8/19/96 (PANEL) [96-35251, 96-35266] (mhf) [96-35251 96-35266]

8/22/96 Received Joel Scrafford, Richard C. Branzell, Robert Prieksat, Kris A. McLean, USA additional citations, served on 8/21/96. (PANEL) [96-35251] (sf) [96-35251]

8/29/96 Filed order (Deputy Clerk; gb) The motion for formal enlargement of time is DENIED.

(PHONED at 8:00 AM) [96-35251] (sf) [96-35251]

9/10/96 Filed order (Deputy Clerk: cc) Court TV applied to videotape the case captioned above, scheduled to be heard in Seattle, on Thursday, September 19, 1996. A majority of the judges on the panel have voted to deny the application. Court TV's request to videotape is DENIED. [96-35251, 96-35266] (sf) [96-35251 96-35266]

9/13/96 Received Turner Broadcasting, Robert Rainey, Donald Hooper, Jack Hamann, Cable News additional citations, served on 9/11/96 (FAXED TO PANEL) [96-35251, 96-35266] (sf) [96-35251 96-35266]

9/19/96 ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Andrew J. KLEINFELD, Rudi M. Brewster [96-35251, 96-35266] (ah) [96-35251 96-35266]

9/19/96 Received Appellants Berger in 96-35251, 96-35266 additional citations, served on 9/19/96. (panel) [96-35251, 96-35266] (ah) [96-35251 96-35266]

9/19/96 Received Turner Broadcasting in 96-35251, Cable News in 96-35266 additional citations, served on 9/19/96. (PANEL) [96-35251, 96-35266] (ah) [96-35252 96-35266]

4/16/97 Rec'd federal aples' (USA, et al) add'l citations; served on 4/15/97 to (PANEL). [96-35251] (jr) [96-35251]

4/28/97	FILED SUPP'L RECORD ON APPEAL IN THREE VOLUMES PLEADINGS & (filed 4/2/96) & 1 expando folder. RECORD NOW IN FOUR VOLUMES. [96-35251] (jr) [96-35251]
8/1/97	Received Paul W. Berger, Erma R. Berger additional citations, served on 7/31/97 (PANEL) [96-35251] (sf) [96-35251]
8/14/97	Rec'd aples' (CNN, HAMANN, TBS, Rainey & Hooper) addl citations; served on 8/12/97 to (PANEL). [96-35266, 96-35251] (jr) [96-35251 96-35266]
10/1/97	Rec'd aplts' ltr of add'l citations; served on 9/29/97 to (PANEL). [96-35251, 96-35266] (jr) [96-35251 96-35266]
10/2/97	Rec's aplts' add'l citations; served on 9/30/97 to (PANEL). [96-35251, 96-35266] (jr) [96-35251 96-35266]
11/13/97	FILED OPINION; AFFIRMED IN PART, REVERSED AND REMANDED IN PART for further proceedings. Costs are awarded to aplts. (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Mary M. Schroeder, author; Andrew J. Kleinfeld; Rudi M. Brewster) FILED AND ENTERED JUDGMENT. [96-35251, 96-35266] (jr) [96-35251 96-35266]
11/26/97	Filed Appellants Paul W. Berger & Erma bill of costs in the amt of $1,011.60, served on

	11/24/97 [96-35266, 96-35251] (mhf) [96-35251 96-35266]
12/5/97	MANDATE ISSUED [96-35251, 96-35266] issued in error, US case. Mdt was rtn from DC, & rcv 12/19/97. (jr) [96-35251 96-35266]
12/23/97	[3364325] Filed original and 40 copies of aple's (Turner Broadcasting, Robert Rainey, Donald Hooper, Cable News petition for rehearing with suggestion for rehearing en banc 15 pages; served on 12/22/97 to (PANEL & ALL ACTIVE JUDGES). [96-35251, 96-35266] (jr) [96-35251 96-35266]
12/29/97	Filed ABC, Inc. et al motion to become amicus curiae; served on 12/26/97 to (PANEL & ALL ACTIVE JUDGES). (3365617) [96-35251, 96-35266] (jr) [96-35251 96-35266]
12/29/97	Rec'd Amicus' (ABC, Inc. et al) brf in 40 copies of 15 pages; served on 12/26/97 to (PANEL & ALL ACTIVE JUDGES). [96-35251, 96-35266] (jr) [96-35251 96-35266]
12/29/97	[3365852] Rec'd federal aples' original and 40 copies petition for rehearing with suggestion for rehearing en banc; served on 12/27/97. Deficient; no covers & entitled "Federal Aples' Petition, et al" & indicates csl is for federal defendants-aplts. Notified counsel (jr) [96-35251 96-35266]
12/29/97	Received ltr dtd 12/23/97 from aplts Paul W. Berger & Erma R. Berger re: to clarify the procedural posture of the recently filed petns for

rhrg & suggestion of appropriateness for rhrg; served on 12/23/97 (PANEL only) [96-35251, 96-35266] (mhf) [96-35251]

1/7/98 Rec'd aples' (Turner Broadcasting, et al in 96-35251 & Jack Hamann & Cable News in 96-35266) ltr dated 1/6/98 in response to ltr rec'd 12/29/97 re: en banc petitions filed to (PANEL & ALL ACTIVE JUDGES; 12/23/97 ltr sent to ALL ACTIVE JUDGES) [96-35251, 96-35266] (jr) [96-35251 96-35266]

1/8/98 [3371030] Filed original and 40 copies federal aples petition for rehearing with suggestion for rehearing en banc 15 pages; served on 12/27/97 to (PANEL & ALL ACTIVE JUDGES). [96-35251] (jr) [96-35251]

1/9/98 Rec'd aplts' (Bergers) ltr dated 1/7/98 in response to media aples 1/6/98 ltr to (PANEL & ALL ACTIVE JUDGES). [96-35251, 96-35266] (jr) [96-35251 96-35266]

1/12/98 Rec'd federal aples' ltr dated 1/6/98 in response to plaintiff-aplts 12/23/97 ltr re: procedures and petition for rehearing to (PANEL & ALL ACTIVE JUDGES). [96-35251] (jr) [96-35251]

2/25/98 Filed order (Mary M. Schroeder, Andrew J. Kleinfeld & Rudi M. Brewster) the petition for rehearing are denied & the suggestions for rehearing en banc are rejected. [3371030-1] in 96-35251, [3364325-1] in 96-35266, 96-35251 [96-35251, 96-35266 (jr) [96-35251 96-35266]

3/4/98 Filed aples' (Turner Broadcasting, et al) motion to stay the mandate pending petition for certiorari, [96-35251, 96-35266] served on 3/3/98 to (MMS). [3406532] (jr) [96-35251 96-35266]

3/4/98 Filed aple's (Rodney C. Hanlon, et al) motion to stay the mandate pending filing of petition for certiorari; [96-35251] served on 3/4/98 to (MMS). [3406901] (jr) [96-35251]

3/9/98 Filed aplts' (Bergers) opposition to motion to stay mdt; served on 3/6/98 to (MMS). [96-35251, 96-35266] (jr) [96-35251 96-35266]

3/12/98 Filed aplts' (Bergers) opposition to motion to stay mdt; served on 3/11/98 to (MMS). [96-35251, 96-35266] (jr) [96-35251 96-35266]

3/13/98 Filed order (Mary M. Schroeder) the motion to stay the mdt pending filing of a petition for certiorari is granted pursuant to FRAP 41. [3406532-1] in 96-35251, 96-35266. [3406901-1] in 96-35251 [96-35251, 96-35266] (jr) [96-35251 96-35266]

6/1/98 Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 97-1914; filed on 5/26/98 & placed on dkt 5/28/98. [96-35251, 96-35266] (jr) [96-35251 96-35266]

6/5/98 Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 97-1927; filed on 5/26/98 & placed on dkt 5/29/98. [96-35251, 96-35266] (jr) [96-35251 96-35266]

7/9/98 Received notice from Supreme Court: petition for certiorari was filed on 6/29/98 & placed on the dkt 7/2/98 as No. 98-38. [96-35251, 96-35266] (mhf) [96-35251 96-35266]

11/5/98 Filed Supreme Court order, certiorari denied on 11/2/98. Supreme Court No. 98-38 [96-35251, 96-35266] (jr) [96-35251 96-35266]

11/13/98 Rec'd nte from Supreme Court, petition for certiorari GRANTED on 11/9/98. The case is consolidated with #98-83, Wilson v. Layne, and a total of 1 hour is allotted for oral argument. Supreme Court No. 97-1927 (jr) [96-35251 96-35266]

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

In the Matter of the Search of The Paul W. Berger Ranch with appurtenant structures, excluding the residence. (See Attachments 1 and 2 for legal description)	SEARCH WARRANT Case Number: MCR-93-9-GF Became CR-93-46-BLG

To: Special Agent, U.S.F.W.S. and any Authorized Officer of the United States

Affidavit(s) having been made before me by Rodney C. Hanlon, Special Agent who has reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

The Paul W. Berger Ranch with appurtenant structures, excluding the residence. (See Attachments 1 and 2 for legal description)

in the _____ District of Montana there is now concealed a certain person or property, namely (describe the person or property)

Documents, records, coyote gettes, cyanide charges, chemicals, livestock carcasses and wildlife carcasses, including eagles, which would document the taking of wildlife in violation of Federal laws (16 USC 668, 16 USC 703, and 16 USC 1538).

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before March 26, 1993 (not to exceed 10 days) the person or place

named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to U.S. Magistrate Robert Holter as required by law.

March 18, 1993 at 9:55 a.m. at Great Falls, Montana
Date and Time Issued — City and State

Robert Holter, U.S. Magistrate /s/
Name & Title of Judicial Officer — Signature of Judicial Officer

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

In the Matter of the Search of The Paul W. Berger Ranch with appurtenant structures, excluding the residence. (See Attachments 1 and 2 for legal description)	APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT Case Number MCR-93-9-GF

I, Rodney C. Hanlon being duly sworn depose and say:
I am a(n) Special Agent, U.S. Fish and Wildlife Service and have reason to believe that ☐ on the person of or ☒ on the premises known as (name, description and/or location)

The Paul W. Berger Ranch with appurtenant structures, excluding the residence. (See Attachments 1 and 2 for legal description)

in the _____ District of Montana there is now concealed a certain person or property, namely (describe the person or property)

Documents, records, coyote gettes, cyanide charges, chemicals, livestock carcasses and wildlife carcasses, including eagles

which is (give alleged grounds for search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure)

would document the taking of wildlife

in violation of Title 16 United States Code, Section(s) 668 and 703 . The facts to support the issuance of a Search Warrant are as follows:

See attached supporting affidavit

Continued on the attached sheet and made a part hereof.
☒ Yes ☐ No

Rodney C. Hanlon /s/
Signature of Affiant

Sworn to before me, and subscribed in my presence

March 18, 1993 at Great Falls, Montana
Date City and State

Robert Holter, U.S. Magistrate /s/
Name & Title of Judicial Officer Signature of Judicial Officer

AFFIDAVIT FOR SEARCH WARRANT

Rodney C. Hanlon, Special Agent, U.S. Fish and Wildlife Service, Department of the Interior, first duly sworn, deposes and states:

1. The affiant has been employed by the United States Fish and Wildlife Service for 20 years, has a Bachelor of Science degree in Wildlife Biology from Washington State University. Affiant has training and experience in the identification of wildlife and conducting wildlife investigations, including eagle poisonings.

2. Since January of 1993, an investigation has been conducted by the United States Fish and Wildlife Service agents, into the poisoning of eagles and other migratory birds on a ranch in Garfield County, Montana.

3. That the United States Fish and Wildlife Service has jurisdiction to enforce the Endangered Species Act, 16 USC 1531 et seq, the Eagle Protection Act, 16 USC 668, and the Migratory Bird Treaty Act, 16 USC 703 et seq, within the United States.

4. The under 16 USC 668(b) all bald or golden eagles or parts, nests or eggs thereof, taken, possessed, sold, purchased, bartered, offered for sale, purchase, or barter, transported, exported, or imported contrary to the provisions of section 668 to 668d of this title shall be subject to forfeiture to the United States.

5. That under 16 USC 668(d) all guns, traps, nets and other equipment, vessels, vehicles, aircraft and other means of transportation used to aid in the taking, possessing and transporting of any bald or golden eagle or part, nest, or egg thereof, in violation of sections 668 to 668d of this title shall be subject to forfeiture to the United States.

6. On January 26, 1993, affiant received information that Mike Moore, Warden Sgt., Montana Department of Fish, Wildlife and Parks, Miles City, Montana interviewed two

former employees of Paul Berger. Berger operates a sheep ranch near Sand Springs, Garfield County, Montana. Both employees had knowledge that Berger uses poisons to kill eagles on the ranch. Dead eagles, other migratory birds and poisons were observed by both former employees.

7. On February 5, 1993, affiant and Special Agent Rick Branzell interviewed Vernon Austin. Austin worked for Paul Berger on the Berger Ranch from October of 1989 through March 25, 1990. During this time, Austin saw three dead eagles on the Berger Ranch. Austin was aware poisons and coyote getters were utilized on the ranch. On two separate occasions, Austin saw coyote getters and poisons in the tool shed on the Berger Ranch. Austin knew where a dump site for eagles was located on the ranch. Austin also observed two sheep carcasses on the ranch. Austin saw dead magpies near these two carcasses.

8. Near the end of December of 1989. Austin and Berger were driving on the Berger Ranch. Austin observed a bald eagle perched on a lamb carcass. Berger told Austin he would come up and put some "dope" on the carcass and take care of the eagle.

9. In mid February of 1990, Austin saw a dead adult bald eagle in the back of Berger's red Chevrolet pickup, parked on the Berger Ranch. The bird was under a set of tire chains. Austin saw the bird's white head.

10. On February 5, 1993, affiant and Special Agent Rick Branzell interviewed Paul Booth. Booth worked for Paul Berger on the Berger Ranch from April of 1989 through December of 1989. While working for Berger, Booth heard Berger express his hatred for eagles on numerous occasions. Berger expressed a dislike for the government because they would not let him use poisons to control eagles on the ranch. Booth said Berger would drive around the ranch looking for carcasses to lace with poison to control predators.

11. In the fall of 1989, Booth observed two dead golden eagles in an oat field he was swathing. The oat field was on the Berger Ranch.

12. Booth said Berger kept numerous chemicals on the ranch including Warbex, Ivomec, poisoned oats and quite possibly Temik. Booth said he had experience with Temik after leaving the Berger Ranch. Booth described Temik as a granular, charcoal colored substance. Booth said these chemicals were observed in the tool shed on the Berger Ranch.

13. Booth found a set of coyote getter on the Berger Ranch. Paul Berger warned Booth to keep his dog out of the area because coyote getters were set in the pasture. Both and Vernon Austin found another coyote getter set near a gate on the Berger Ranch.

14. On February 6, 1993, affiant and Special Agent Rick Branzell interviewed Tanya Jones. Jones worked for Paul Berger on the Berger Ranch from January 1, 1991 through March 16, 1991. During this time, Jones saw approximately ten dead eagles on the Berger Ranch.

15. In February of 1991, Jones found some dead lambs on the Berger Ranch. Jones told Berger about them. Jones observed Berger take a plastic container out of the shop and put it in his new maroon and black Chevrolet pickup. Jones and Berger would drive out to the lamb carcasses. Jones would observe Berger pouring a portion of the contents of the plastic container on the carcasses.

16. Jones said all of the dead eagles she saw on the Berger Ranch were found within five feet of the lamb carcass. Jones observed Berger pouring this chemical on the lamb carcasses many times. Berger referred to this chemical as "dope." Berger told Jones this chemical was outlawed a few years back.

17. Jones and Berger found a live bald eagle, that appeared sick, near a lamb carcass on the ranch. Berger shot and killed the bird with a rifle in the presence of Jones. Berger then

placed the bird in his new maroon and black Chevrolet pickup. Berger hid the bird under a pile of rocks on the ranch.

18. Jones asked Berger it was illegal to poison eagles. Berger said yes he knew it was illegal. Berger said they count eagles in Yellowstone Park. They miss the birds on his place. Berger said eagles kill his sheep and he has to make a living.

19. Jones said Berger was paranoid about being caught poisoning eagles on the ranch. Jones said Berger routinely hid dead eagles under trees and rock piles to avoid detection, from the air, by the Fish and Game.

20. In February of 1993, affiant acquired a 1990 land ownership map of Garfield County, Montana. Affiant located all land owned by Paul Berger. Berger's land was identified by the number 134. (See Attachment 2).

21. On March 15, 1993, affiant requested a records check be conducted by the Permits Examiner, U.S.F.W.S., Denver, Colorado. The examination revealed Paul W Berger does not have a permit or authorization by the U.S. Fish and Wildlife Service to take, possess, or transport bald or golden eagles.

22. Based on the aforementioned parts and the experience of this agent, said premises known as the Paul W. Berger Ranch with appurtenant structures, excluding the residence (See Attachments 1 and 2 for legal description) contain documents, records, coyote getters, cyanide charges, chemicals, livestock carcasses and wildlife carcasses, including eagles, which would document parts of past and ongoing criminal violations, and are therefore subject to search and seizure under 16 USC 668 et seq, 16 USC 703 et seq., 16 USC 1538, and Rule 41.

23. The information contained in this affidavit is known to the affiant through interviews of Vernon Austin, Paul Booth, Tanya Jones, records checks of Garfield County, and discussions with Warden Sgt. Mike Moore.

24. Based on the experience of affiant in conducting eagle poisoning investigations, it is common practice for sheep producers to control predators during the spring lambing season. It is believed by affiant that Paul W. Berger has illegally poisoned eagles from 1989-1991 and that this criminal conduct continues at the present time.

/s/
Rodney C. Hanlon, Special Agent
U.S. Fish and Wildlife Service

Sworn to before me, and subscribed in my presence, this 18th day of March 1993.

/s/
Robert Holter, U.S. Magistrate
United States District Court
District of Montana

Attachment 1

Legal Description of Paul Berger's Deeded Lands

T 17 N, R 33 E, Sections 3,4,5, and 6

T 18 N, R 31 E, Section 13

T 18 N, R 32 E, Sections 2,3,5,8,9,10,13,14,15,17,18,20,21, 22,23,24,25,26, and 27

T 18 N, R 33 E, Sections 17,18,19,20,21,22,26,27,28,29,30, 31,32,33,34, and 35

T 19 N, R 31 E, Sections 11,12,13, and 14

T 19 N, R 32 E, Sections 1,9,10,11,12,13,15,27,28,29,32,33, 34, and 35

T 19 N, R 33 E, Sections 6 and 7

T 19 N, R 34 E, Sections 4 and 6

T 20 N, R 34 E, Sections 32 and 33

All Montana Principal Meridian

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

In the Matter of the Search of	)
The Paul W. Berger Ranch with	)
appurtenant structures, excluding	) No. MCR-93-9-GF
the residence.	)

IT IS ORDERED that the above-captioned file is hereby unsealed.

DONE AND DATED this 2nd day of April 1993.

/s/
ROBERT M. HOLTER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

In the Matter of the Seizure of
One 1990 Chevrolet truck,
red and black in color, Montana
license plate 50T 199A,
VIN 1GCGK34N9LE144315

SEIZURE WARRANT

Case Number:
MCR-93-10-GF

To: Special Agent, U.S.F.W.S. and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Rod Hanlon who has reason to believe that ☐ on the person of or ☐ on the premises known as (name, description and/or location)

One 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315

in the _____ District of Montana there is now concealed a certain person or property, namely (describe the person or property)

and said 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315 was used to transport an eagle in violation of 16 USC 668 and is subject to forfeiture pursuant to 16 USC 668.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to seize on or before March 26, 1993 (not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to U.S. Magistrate Robert Holter as required by law.

March 18, 1993 at 10:00 a.m. at Great Falls, Montana
Date and Time Issued — City and State

Robert Holter, U.S. Magistrate — /s/
Name & Title of Judicial Officer — Signature of Judicial Officer

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

In the Matter of the Seizure of One 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315	APPLICATION AND AFFIDAVIT FOR SEIZURE WARRANT Case Number MCR-93-10-GF Became CR-93-46-BLG

I, Rodney C. Hanlon being duly sworn depose and say:
I am a(n) Special Agent, U.S. Fish and Wildlife Service
and have reason to believe that ☐ xxxxxxxxxxxxxxxxxx
☐ xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

in the _____ District of Montana there is now concealed a certain person or property, namely (describe the person or property)

One 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)

That said 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315 was used to transport an eagle concerning a violation of Title 16 United States Code, Section(s) 668 . The facts to support a finding of Probable Cause are as follows:

See attached supporting affidavit

Continued on the attached sheet and made a part hereof.
☒ Yes ☐ No

Rodney C. Hanlon /s/
Signature of Affiant

Sworn to before me, and subscribed in my presence

March 18, 1993 at Great Falls, Montana
Date City and State

Robert Holter, U.S. Magistrate /s/
Name & Title of Judicial Officer Signature of Judicial Officer

AFFIDAVIT FOR SEIZURE WARRANT

Rodney C. Hanlon, Special Agent, U.S. Fish and Wildlife Service, Department of the Interior, being first duly sworn, deposes and states:

1. The affiant has been employed by the United States Fish and Wildlife Service for 20 years, has a Bachelor of Science degree in Wildlife Biology from Washington State University. Affiant has training and experience in the identification of wildlife investigations, including eagle poisonings.
2. Since January of 1993, an investigation has been conducted by the United States Fish and Wildlife Service agents, into the poisoning of eagles and other migratory birds on a ranch in Garfield County, Montana.
3. That the United States Fish and Wildlife Service has jurisdiction to enforce the Endangered Species Act, 16 USC 1531 et seq, the Eagle Protection Act, 16 USC 668, and the Migratory Bird Treaty Act, 16 USC 703-707 within the United States.
4. The under 16 USC 668(b) vessels, vehicles, aircraft, and other means of transportation used to aid in the taking, possessing, selling, purchasing, bartering, offering for sale, purchase, or barter, transporting, exporting, or importing of any bald or golden eagle in violation of 16 USC 668 to 16 USC 668d, shall be subject to forfeiture to the United States.
5. On January 26, 1993, affiant received information that Mike Moore, Warden Sgt., Montana Department of Fish, Wildlife and Parks, Miles City, Montana, interviewed two former employees of Paul Berger. Berger operates a sheep ranch near Sand Springs, Garfield County, Montana. Both employees had knowledge that Berger uses poisons to kill eagles on the ranch. Dead eagles, and poisons were observed in two of Berger's vehicles.

6. On February 6, 1993, affiant and Special Agent Rick Branzell interviewed Tanya Jones. Jones worked for Paul Berger on the Berger Ranch from January 1, 1991 through March 16, 1991. During this time, Jones saw approximately ten dead eagles on the Berger Ranch.
7. In February of 1991, Jones found some dead lambs on the Berger Ranch. Jones told Berger about them. Jones observed Berger take a plastic container out of the shop and put it in his new maroon and black Chevrolet pickup. Jones knew the truck was new as it still had plastic seatcovers on it. Berger and Jones drove out to the lamb carcasses in this truck. Jones observed Berger pour a portion of the contents of the plastic container on the lamb carcasses.
8. Jones said all the dead eagles she saw on the Berger Ranch were found within five feet of a lamb carcass. Jones observed Berger pouring this chemical on lamb carcasses many times. Berger referred to this chemical as "dope." Berger said this chemical was outlawed a few years back.
9. Jones and Berger found a live bald eagle, that appeared sick, near a lamb carcass on the ranch. Berger shot and killed the bird with a rifle. Berger put the bird in the back of his red and black Chevrolet pickup. Berger took the bird to a pile of rocks and hid it in the rocks. Jones observed Berger kill, transport and hide the bird.
10. Jones said Berger knew it was illegal to use poisons to control birds. Berger said eagles killed his sheep and he had to make a living.
11. On February 18, 1993, Shirley Squire, Legal Assistant in Billings, Montana ran an inquiry into all vehicles owned by Paul Berger.
12. On February 26, 1993, affiant received the results of the motor vehicle inquiry from the Registrar's Bureau in Deer Lodge, Montana. It shows a 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315 is registered to Paul W. Berger,

General Delivery, Sand Springs, Montana. The date of purchase of this vehicle is December 31, 1990.

13. On March 15, 1993, affiant requested a records check to be conducted by the Permits Examiner, U.S.F.W.S., Denver, Colorado. That examination revealed Paul W. Berger did not have a permit or authorization by the U.S. Fish and Wildlife Service to take, possess, or transport bald or golden eagles.

14. Based on the aforementioned parts and the experience of this agent, said 1990 Chevrolet truck, red and black in color, Montana license plate 50T 199A, VIN 1GCGK34N9LE144315 is part of past criminal violations (16 USC 668) and thus subject to forfeiture pursuant to 16 USC 668b.

15. The information contained in this affidavit is known to the affiant through an interview of Tanya Jones and discussion with Warden Sgt. Mike Moore.

/s/
Rodney C. Hanlon, Special Agent
U.S. Fish and Wildlife Service

Sworn to before me, and subscribed in my presence, this 18th day of March 1993.

/s/
Robert Holter, U.S. Magistrate
United States District Court
District of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

In the Matter of the Seizure of	)
One 1990 Chevrolet Truck, Red	)
and Black in Color, Montana	) No. MCR-93-10-GF
License Plate 50T 199A, VIN	)
1GCGK34N9LE144315	)

IT IS ORDERED that the above-captioned file is hereby unsealed.

DONE AND DATED this 2nd day of April 1993.

/s/
ROBERT M. HOLTER
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

In the Matter of the Seizure of One 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605	SEIZURE WARRANT Case Number: MCR-93-11-GF Became CR-93-46-BLG

To: Special Agent, U.S.F.W.S. and any Authorized Officer of the United States

Affidavit(s) having been made before me by Special Agent Rod Hanlon who has reason to believe that ☐ on the person of or ☐ on the premises known as (name, description and/or location)

One 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605

in the _____ District of Montana there is now concealed a certain person or property, namely (describe the person or property)

and said 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605 was used to transport an eagle in violation of 16 USC 668 and is subject to forfeiture pursuant to 16 USC 668.

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to seize on or before March 26, 1993 (not to exceed 10 days) the person or place

named above for the person or property specified, serving this warrant and making the search (in the daytime - 6:00 A.M. to 10:00 P.M.) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to U.S. Magistrate Robert Holter as required by law.

March 18, 1993 at 10:00 a.m. at Great Falls, Montana
Date and Time Issued — City and State

Robert Holter, U.S. Magistrate — /s/
Name & Title of Judicial Officer — Signature of Judicial Officer

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

In the Matter of the Seizure One 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605	APPLICATION AND AFFIDAVIT FOR SEIZURE WARRANT Case Number MCR-93-11-GF Became CR-93-46-BLG

I, Rodney C. Hanlon being duly sworn depose and say:
I am a(n) Special Agent, U.S. Fish and Wildlife Service
and have reason to believe that ☐ xxxxxxxxxxxxxxxx
☐ xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

in the _____ District of Montana there is now concealed a certain person or property, namely (describe the person or property)

One 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Rules of Criminal Procedure)

That said 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605 was used to transport an eagle

concerning a violation of Title 16 United States Code, Section(s) 668 . The facts to support a finding of Probable Cause are as follows:

See attached supporting affidavit

Continued on the attached sheet and made a part hereof.
☒ Yes ☐ No

Rodney C. Hanlon /s/
Signature of Affiant

Sworn to before me, and subscribed in my presence

March 18, 1993 at 10:00 AM at Great Falls, Montana
Date City and State

Robert Holter, U.S. Magistrate /s/
Name & Title of Judicial Officer Signature of Judicial Officer

AFFIDAVIT FOR SEIZURE WARRANT

Rodney C. Hanlon, Special Agent, U.S. Fish and Wildlife Service, Department of the Interior, being first duly sworn, deposes and states:

1. The affiant has been employed by the United States Fish and Wildlife Service for 20 years, has a Bachelor of Science degree in Wildlife Biology from Washington State University. Affiant has training and experience in the identification of wildlife and conducting wildlife investigation, including eagle poisonings.
2. Since January of 1993, an investigation has been conducted by the United States Fish and Wildlife Service agents, into the poisoning of eagles and other migratory birds on a ranch in Garfield County, Montana.
3. That the United States Fish and Wildlife Service has jurisdiction to enforce the Endangered species Act, 16 USC 1531 et seq., the Eagle Protection Act, 16 USC 668, and the Migratory Bird Treaty Act, 16 USC 703-707 within the United States.
4. The under 16 USC 668(b) vessels, vehicles, aircraft, and other means of transportation used to aid in the taking, possessing, selling, purchasing, bartering, offering for sale, purchase, or barter, transporting, exporting, or importing of any bald or golden eagle in violation of 16 USC 668 to 16 USC 668d, shall be subject to forfeiture to the United States.
5. On January 26, 1993, affiant received information that Mike Moore, Warden Sgt., Montana Department of Fish, Wildlife and Parks, Miles City, Montana interviewed two former employees of Paul Berger. Berger operates a sheep ranch near Sand Springs, Garfield County, Montana. Both employees had knowledge that Berger uses poisons to kill eagles on the ranch. Dead eagles, and poisons were observed in two of Berger's vehicles.

6. On February 5, 1993, affiant and Special Agent Rick Branzell interviewed Vernon Austin. Austin worked for Paul Berger on the Berger Ranch from October of 1989 through March 25, 1990. During this time, Austin saw three dead eagles on the Berger Ranch. Austin was aware poisons and coyote getters were utilized on the ranch.
7. Near the end of December of 1989, Austin and Berger were driving on the Berger Ranch. Austin observed a bald eagle perched on a lamb carcass. Berger advised Austin he would come up and put some "dope" on the carcass and take care of the eagle.
8. In mid February of 1990, Austin saw a dead adult bald eagle in the back of Berger's red Chevrolet pickup. The bird was under a set of tire chains. Austin saw the bird's white head.
9. Austin further stated in March of 1990, another ranch hand found a dead golden or juvenile bald eagle on the Berger Ranch. Berger took this bird from the ranch hand. Berger said he was going to get rid of it. Austin observed Berger take the eagle from the ranch hand, throw the eagle in the back of his red Chevrolet pickup, and drive off.
10. On February 18, 1993, Shirley Squire, Legal Assistant in Billings, Montana ran an inquiry into all vehicles owned by Paul Berger.
11. On February 26, 1993, affiant received the results of the motor vehicle inquiry from the Registrar's Bureau in Deer Lodge, Montana. It shows a 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605 is registered to Paul W. Berger, General Delivery, Sand Springs, Montana.
12. On March 15, 1993, affiant requested a records check to be conducted by the Permits Examiner, U.S.F.W.S., Denver, Colorado. The examination revealed that Paul W. Berger does not have a permit or authorization by the U.S. Fish and Wildlife Service to take, possess, or transport bald or golden eagles.

13. Based on the aforementioned parts and the experience of this agent, said 1988 Chevrolet truck, red in color, Montana license plate 50T 3493, VIN 1GCGK34J1JE172605 is part of past criminal violations (16 USC 668) and thus subject to forfeiture pursuant to 16 USC 668b.
12. [sic] The information contained in this affidavit is known to the affiant through an interview of Vernon Austin and discussion with Warden Sgt. Mike Moore.

/s/
Rodney C. Hanlon, Special Agent
U.S. Fish and Wildlife Service

Sworn to before me, and subscribed in my presence, this 18th day of March 1993.

/s/
Robert Holter, U.S. Magistrate
United States District Court
District of Montana

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

In the Matter of the Seizure of	)
One 1988 Chevrolet Truck, Red	)
in Color, Montana License	) No. MCR-93-11-GF
Plate 50T 3493, VIN	)
1GCGK34J1JE17205 [sic]	)

IT IS ORDERED that the above-captioned file is hereby unsealed.

DONE AND DATED this 2nd day of April 1993.

/s/
ROBERT M. HOLTER
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PAUL W. BERGER and ERMA R. BERGER Plaintiffs, vs. RODNEY C. HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. McLEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, ROBERT RAINEY, and DONALD HOOPER, Defendants.	) Case No. CV 95-046-BLG-JDS)) FIRST AMENDED COMPLAINT) FOR DAMAGES FOR THE) VIOLATIONS OF THE UNITED) STATES CONSTITUTION) (FOURTH AMENDMENT),) CONSPIRACY, TRESPASS,) INTENTIONAL INFLICTION OF) EMOTIONAL DISTRESS,) CONVERSION, FOR) DECLARATORY JUDGMENT) AND INJUNCTION, AND) FEDERAL WIRETAP STATUTE) DEMAND FOR JURY TRAIL

COMPLAINT

Plaintiffs Paul W. Berger and Erma R. Berger, by and through their attorneys of record, Jay F. Lansing and Charles F. Moses of the Moses Law Firm, and Henry H. Rossbacher of Rossbacher & Associates, complain against the defendants and allege as follows:

PRELIMINARY STATEMENT

1. This is a civil action against Rodney C. Hanlon, Joel Scrafford, Richard C. Branzell, Robert Prieksat, Kris A. McLean, Turner Broadcasting Systems, Inc., Robert Rainey, and Donald Hooper.

2. Plaintiffs seek monetary and punitive damages for constitutional violations including invasion of Fourth Amendment rights and privacy arising under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), violation of the Federal wiretapping

statute 18 U.S.C. § 2510, et seq., as well as common law claims of trespass, emotional distress, and declaratory judgment and an injunction. Plaintiffs' claims arise from the unauthorized invasion of their private property by Cable News Network, Inc. and Turner Broadcasting Systems, Inc. and their camera crew, for the unauthorized videotaping, recording and broadcasting of the execution of a search warrant on plaintiffs' private property by Special Agents of the Fish and Wildlife Service of the United States Department of the Interior, along with Refuge Officers of the Fish and Wildlife Service of the United States Department of the Interior, as well as other agents of the United States Bureau of Land Management of the Department of the Interior, Montana Department of Fish, Wildlife and Parks, and Montana Department of Agriculture.

3. This action seeks to prevent and redress the deprivation of the rights, privileges and immunities secured by the United States Constitution and the Amendments thereto and the laws of the United States, the State of Montana and common law principles, and to obtain recovery for damages proximately caused by defendants in so violating those rights, laws and principles.

4. Plaintiffs bring the following claims:

I. Fourth Amendment Violation (Search and Seizure; Privacy) against defendants Turner Broadcasting Systems, Inc., Robert Rainey, Donald Hooper, and defendant agents Rodney C. Hanlon, Joel Scrafford, Rick Branzell, Robert Prieksat and AUSA Kris A. McLean;

II. Conspiracy to Violate the Fourth Amendment against all defendants;

III. Trespass against defendants Turner Broadcasting Systems, Inc., Robert Rainey, Donald Hooper and AUSA Kris A. McLean;

IV. Conversion against defendants Turner Broadcasting Systems, Inc., Robert Rainey and Donald Hooper;

V. Intentional Infliction of Emotional Distress against defendants Turner Broadcasting Systems, Inc., Robert Rainey and Donald Hooper;

VI. Declaratory Judgment against all defendants;

VII. Injunction against defendants Turner Broadcasting Systems, Inc., Robert Rainey and Donald Hooper; and

VIII. Violation of the Federal wiretapping statute, 18 U.S.C. § 2511, against defendants Turner Broadcasting Systems, Inc., Robert Rainey and Donald Hooper.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 insofar as a substantial question of Federal Law is involved arising under the United States Constitution, in particular the Fourth Amendment thereto.

6. This Court also has supplemental jurisdiction over the state law claims arising under the laws of the State of Montana and common law principles pursuant to 28 U.S.C. § 1367(a) insofar as the state law claims are transactionally related to other claims in this action that are within this Court's original jurisdiction, such that they form a part of the same case or controversy under Article III of the United States Constitution.

7. Venue is proper in this Judicial District pursuant to 28 U.S.C. §1391 insofar as it is the judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.

8. While there is no jurisdictional amount required in connection with 28 U.S.C. §§ 1331 and 1367(a), the amount in controversy, exclusive of interest and costs, exceeds the sum of $50,000.00.

PARTIES

9. Plaintiff Paul W. Berger is a resident of Garfield County, Montana and the husband of plaintiff Erma R.

Berger. Mr. Berger is a cattle and sheep rancher on certain real property located within Garfield County, Montana.

10. Plaintiff Erma R. ("Rosie") Berger is a resident of Garfield County, Montana and the wife of plaintiff Paul W. Berger. Mrs. Berger is a cattle and sheep rancher with her husband on certain real property located within Garfield County, Montana. Plaintiffs Paul R. Berger and Erma R. Berger will hereinafter collectively be referred to as "plaintiffs" or "the Bergers."

11. Cable News Network, Inc. ("CNN"), on information and belief, is a Georgia corporation and authorized to and doing business in the State of Montana. CNN's principal place of business is in Atlanta, Georgia, which is the same as defendant Turner Broadcasting Systems, Inc. At all times relevant to this complaint, CNN was acting as an agent for Turner Broadcasting Systems, Inc. and its affiliates, and was and is engaged in the business of broadcasting entertainment and news and information programs over cable television throughout the United States and abroad, either directly or through its affiliates and has sufficient minimum contacts within this judicial district.

12. Defendant Turner Broadcasting System, Inc. ("TBS"), on information and belief, is a Georgia corporation and is authorized to and doing business in the State of Montana. TBS' principal place of business is in Atlanta Georgia, which is the same as defendant CNN. At all times relevant to this complaint, TBS was acting as an agent for CNN and its affiliates, and was and is engaged in the business of broadcasting entertainment and news and information programs over cable television throughout the United States and abroad, either directly or through its affiliates and has sufficient minimum contacts within this judicial district.

13. Jack Hamann ("Hamann"), on information and belief and at all times relevant to the allegations of this

Complaint, was employed by or acting as an agent of CNN as a correspondent for CNN's Environment Unit.

14. Defendant Robert Rainey ("Rainey"), on information and belief and at all times relevant to the allegations of this Complaint, was employed by or acting as an agent of CNN as a camera operator for CNN's Environment Unit. Defendant Rainey is sued individually and as an agent, servant or employee of CNN and TBS, and in his official capacity. Upon information and belief defendant Rainey is a resident of the State of Georgia.

15. Defendant Donald Hooper ("Hooper"), on information and belief and at all times relevant to the allegations of this Complaint, was employed by or acting as an agent of CNN as an audio technician for its Environment Unit. Defendant Hooper is sued individually and as an agent, servant or employee of CNN and TBS, and in his official capacity. Upon information and belief defendant Rainey is a resident of the State of Georgia.

16. CNN, TBS, Hamann, Rainey and Hooper will hereinafter collectively be referred to as the "CNN Defendants" or, alternatively, defendants Rainey and Hooper will be referred to as the "CNN Camera Crew."

17. Defendant Rodney C. Hanlon ("Hanlon"), on information and belief and at all times relevant to the allegations of this Complaint, was and is a Special Agent of the United States Fish and Wildlife Service of the Department of the Interior, and duly appointed at law and acting as such. He is sued in his individual capacity and as an agent of CNN, TBS, Hamann, Rainey and Hooper. Upon information and belief and at all times relevant to the allegations of this Complaint, defendant Hanlon was a resident of the State of Montana.

18. Defendant Joel Scrafford ("Scrafford"), on information and belief and at all times relevant to the allegations of this Complaint, was and is a Special Agent of the United States Fish and Wildlife Service of the

Department of the Interior, and duly appointed at law and acting as such. He is sued in his individual capacity and as an agent of CNN, TBS, Hamann, Rainey and Hooper. Upon information and belief and at all times relevant to the allegations of this Complaint, defendant Scrafford was a resident of the State of Montana.

19. Defendant Richard C. Branzell ("Branzell"), on information and belief and at all times relevant to the allegations of this Complaint, was and is a Special Agent of the United States Fish and Wildlife Service of the Department of the Interior, and duly appointed at law and acting as such. He is sued in his individual capacity and as an agent of CNN, TBS, Hamann, Rainey and Hooper. Upon information and belief and at all times relevant to the allegations of this Complaint, defendant Branzell was a resident of the State of Montana.

20. Defendant Robert Prieksat ("Prieksat"), on information and belief and at all times relevant to the allegations of this Complaint, was and is a Special Agent of the United States Fish and Wildlife Service of the Department of the Interior, and duly appointed at law and acting as such. He is sued in his individual capacity and as an agent of CNN, TBS, Hamann, Rainey and Hooper. Upon information and belief and at all times relevant to the allegations of this Complaint, defendant Prieksat was a resident of the State of Montana.

21. The United States Fish and Wildlife Service of the Department of the Interior will hereinafter alternatively be referred to as "the Service."

22. Defendant Kris A. McLean ("AUSA McLean"), on information and belief and at all times relevant to the allegations of this Complaint, was and is an Assistant United States Attorney for the District of Montana in the Office of the United States Attorney in Helena, Montana ("U.S. Attorney"), duly appointed and acting as such. He is sued in his individual capacity and as an agent of CNN, TBS,

Hamann, Rainey, Hooper, the Service and defendant Special Agents Hanlon, Scrafford, Branzell and Prieksat. Upon information and belief and at all times relevant to the allegations of this Complaint, defendant McLean was a resident of the State of Montana.

23. Defendant Special Agents Hanlon, Scrafford, Branzell and Prieksat will hereinafter alternatively be referred to as "Special Agents," "Agents," or "Government Agents" or collectively with defendant McLean as the "Government Defendants."

24. In committing the acts and in failing and omitting to act as hereafter alleged, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, were acting with the implied and actual permission and consent of the United States Fish and Wildlife Service of the Department of the Interior and United States Attorney for the District of Montana.

25. In committing the acts and in failing and omitting to act as hereafter alleged, defendants Hanlon, Scrafford, Branzell and Prieksat, were acting in their capacity as officers and employees of the United States Fish and Wildlife Service of the Department of the Interior.

26. In committing the acts and in failing and omitting to act as hereafter alleged, defendant McLean was acting in his capacity as an officer and employee of the Office of the United States Attorney for the District of Montana of the United States Department of Justice.

27. Each of the defendants may be legally responsible for the acts and omissions of the other defendants under recognized legal theories.

28. At all relevant times, defendants, and each of them, acted jointly and in concert, and were acting as the agents, servants and collaborators of each of the other defendants, and were acting with the full knowledge and consent, either express or implied, of each of the other defendants.

PRELIMINARY ALLEGATIONS

29. Plaintiff Rosie Berger was born on April 15, 1911, and has lived her entire life on her property in Garfield County, Montana. Plaintiff Paul W. Berger was born on April 7, 1921, and has been a resident of Garfield County, Montana for approximately seventy (70) years.

30. Plaintiffs are in possession of certain real property known as "the Berger Ranch" located north of Sand Springs in Garfield County, Montana. The entire property is owned and leased by Mr. Berger and/or Mrs. Berger. The house in which plaintiffs reside is located on the Berger Ranch in Section 31 of Township 18 North, Range 33 East, M.P.M., surrounded by various outbuildings. During all times relevant to the allegations in the Complaint, plaintiffs had and continue to have a reasonable expectation of privacy over the entire Berger Ranch, including the residence and outbuildings.

31. At all times relevant to the allegations of this Complaint, Mrs. Berger was not under investigation by law enforcement authorities and was neither charged nor convicted of any crime. No evidence of any complicity in any crime by Mrs. Berger was found as a result of the activities of the defendants at issue in this suit.

32. Within days before the execution of the search warrant at the Berger Ranch, plaintiffs had just been released from the hospital and were both recuperating from serious illnesses. At the time of the search, Mr. Berger was on medication and oxygen. Defendants were repeatedly warned prior to executing the search warrant that plaintiffs were both in very poor health. Due to their advanced age and serious illnesses, plaintiffs are protective of their solitude and privacy.

BACKGROUND ALLEGATIONS

33. This Complaint arises from unconstitutional acts involving the use of private property as a soundstage for the intruding eye and ear of the media whose access was planned

and compelled by the Government Defendants under the auspices of a search warrant. The CNN Camera Crew that entered the private property to be searched by the Government Agents did so to seize images of the property and residents and the latters' oral statements for broadcast to the world and for financial profit -- not for any legitimate law enforcement purpose related to execution of the search warrant. The illegal presence of the media on private property and the ensuing repeated illegal seizures were achieved through the concerted, deceptive actions of the Government Defendants and the CNN Camera Crew, TBS and CNN, who conspired to further their own private interests by turning a law enforcement operation into a titillating media event.

34. In early 1993, agents of the Service were approached by CNN because CNN wanted to accompany the agents to videotape the execution of a search warrant related to a confidential criminal investigation. The investigation of the Berger Ranch was initiated by the Service in or about January 1993 after disgruntled former employees of the Bergers made uncorroborated allegations that they saw Mr. Berger poison or shoot eagles in 1989 to 1991. CNN wanted live action footage to broadcast on the "Earth Matter" and "Network Earth" environmental programs for CNN and TBS. CNN and the Government Agents determined that it was in their respective interests to obtain national and international coverage of their endeavors and they agreed to cooperate.

35. In furtherance of the Government Agents' decision to cooperate with the media and involve the media in the criminal investigation, the agents introduced CNN to defendant AUSA McLean. In violation of Department of Justice regulations, AUSA McLean, on behalf of the U.S. Attorney wrongfully agreed to provide CNN with secret information from both the U.S. Attorney and the Service regarding the pending criminal investigation. AUSA McLean executed a written agreement to permit the agents to misuse

their authority under the expected search warrant to take the media onto private property and to violate plaintiffs' rights.

36. The agreement was memorialized and circulated in materials distributed within CNN two (2) weeks before the search warrant was applied for and obtained.

37. The executed letter agreement ("Letter Agreement"), between defendant AUSA McLean on behalf of the U.S. Attorney and the Service and Hamann on behalf of CNN and TBS, was dated March 11, 1993 and provides, in pertinent part, that:

> This confirms our agreement that the United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS agents as they attempt to execute a criminal search warrant near Jordan, Montana, sometime during the week of March 22, 1993. . . .

The letter was executed by defendant AUSA McLean and Hamann. A true and correct copy of the executed Letter Agreement is attached hereto as Exhibit "A."

38. Under the Letter Agreement, defendant AUSA McLean, on behalf of the U.S. Attorney and the Service, gave permission to CNN, its employees, and agents to enter the Berger Ranch under the authority of the search warrant. The presence of the CNN Camera Crew was not necessary for the execution of the search warrant. CNN's Legal Department was provided with a copy of the Letter Agreement.

39. The CNN Defendants planned and organized their participation with the Government Defendants in the search of the Berger Ranch prior to the issuance and execution of the search warrant. This plan was outlined in a March 11, 1993, CNN Network Earth/Earth Matters "Producer Package Checklist: Story Set-Up Packet" ("Story Set-Up"), prepared by Hamann, who is identified as the correspondent, along with associate producer Susan Olson, photographer Rob Rainey, and tech Don Hooper.

40. With permission from and cooperation by defendant AUSA McLean and other representatives of the Service, CNN Defendants planned to videotape and record the execution of the search warrant from which to obtain useful "sound bites." The focus of the CNN story was to disclose the alleged poisoning of endangered species, such as eagles, by ranchers who claimed to be protecting their livestock from predators. CNN planned to use the elderly Bergers to illustrate these acts, casting them unwittingly in the role of inhumane barbarians for the purpose of broadcasting a derogatory portrayal for all the world to see. The Berger Ranch was chosen as the soundstage and backdrop for the broadcast by CNN and TBS.

41. All of this information was deliberately concealed from the United States Magistrate Judge, the independent judicial officer who was presented with the Application and Affidavit in support of the search warrant. The Application and Affidavit were submitted by defendant agent Hanlon for approval to the Magistrate Judge well after the Letter Agreement was executed by AUSA McLean and CNN.

42. The Letter Agreement and the defendants' ensuing actions undertaken to implement the agreement violated the Fourth Amendment of the Constitution proscribing unreasonable searches and seizures, and Federal statutes implementing that constitutional provision. 18 U.S.C. § 3105 mandates that only authorized officers or others necessary to aid them may serve or execute a search warrant. Federal Rule of Criminal Procedure 41 provides that a warrant is to be issued only to a "civil officer" of the United States Government.

43. The Letter Agreement and the defendants' ensuing actions further violate Department of Justice (DOJ) Regulations which drastically limit the media's access to information about on-going criminal investigations.

44. Defendants' actions described below further violated Montana law creating common law causes of action

for trespass, conversion and intentional infliction of emotional distress.

45. On or about March 18, 1993, at 9:55 a.m., the Magistrate Judge issued a search warrant to defendant Special Agent Hanlon authorizing him and other Special Agents of the Service to search:

The Paul W. Berger Ranch with appurtenant structures, excluding the residence. The warrant authorized defendant agent Hanlon and the others so authorized to search for the following items:

> Documents, records, coyote getters, cyanide charges, chemicals, livestock carcasses and wildlife carcases, including eagles, which would document the taking of wildlife in violation of Federal laws (16 USC 668, 16 USC 703, and 16 USC 1538).

46. The warrant authorized a search of only Mr. Berger's deeded lands described in Attachment 1 to the Application and Affidavit of defendant agent Hanlon; this comprises only about 5,000 acres, while the search covered almost the entire Berger Ranch of as much as 75,000 acres.

47. On or about March 18, 1993 at 10:00 a.m., the Magistrate Judge also issued two (2) Seizure Warrants, for Mr. Berger's 1988 and 1990 Chevrolet trucks, which both Seizure Warrants Application alleged were used to "transport an eagle in violation of 16 USC 668 and is subject to forfeiture pursuant to 16 USC 668."

48. The warrants were issued specifically to defendant agent Hanlon in his official capacity. He was the Special Agent acting as the case coordinator and in charge of the execution of the search warrant on the morning of March 24, 1993, by himself and other authorized agents of the Service, to search plaintiffs' ranch, excluding the residence, for the specific items listed in the warrant. Defendant agent Hanlon had been assigned as the case coordinator by his supervisor, defendant agent Scrafford.

49. The CNN Defendants were permitted to attend, participate in and videotape and record the pre-search briefing on or about March 23, 1993. Defendant agent Hanlon, acting as project coordinator of the search of the Berger Ranch, code-named "Operation Dope," conducted the briefing. All or most of the individuals who participated in the search of the Berger Ranch on March 24, 1993 attended this briefing, including defendant agents Scrafford, Branzell and Prieksat, and defendant AUSA McLean. Other Federal and State agents in attendance included approximately seven (7) Refuge Officers of the Service, approximately three (3) wardens with Montana State Fish and Game, and one (1) agent of the Federal Bureau of Land Management ("BLM"). The CNN Defendants were also presents.

50. Defendant agent Hanlon announced at the briefing that the CNN Defendants were present. The Government Defendants as well as the remaining Federal and State agents in attendance at the briefing permitted the videotaping and recording of the briefing by the CNN Defendants. The Government Defendants along with the CNN Defendants, planned, arranged and made it possible for the CNN Defendants to attend the videotape and record the briefing.

51. Defendant AUSA McLean conducted a portion of the pre-search briefing to address the legal aspects of the case and he and the other Government Defendants disclosed confidential information about the Bergers and the pending criminal investigation to the CNN Defendants.

52. The Government Defendants and other agents at the briefing discussed plans for the CNN Defendants to accompany them the following day to videotape and record the execution of the search warrant at the Berger Ranch.

53. The Government and CNN Defendants deliberately planned to deceive the Bergers by concealing the presence and identity of the CNN Defendants at the Berger Ranch during the execution of the search warrant. They discussed whether there was something to call Hamann and the CNN

Camera Crew other than "CNN" to avoid alerting Mr. Berger as to their real identify.

54. Defendant Branzell conducted a portion of the briefing to address the poisons and chemicals being sought under the search warrant. He also reiterated to those present that the search warrant did not include the residence and that it would not be searched because Mr. Berger did not store any poisons in the residence.

55. At approximately 6:00 a.m. on or about March 24, 1993, the "Operation Dope" raid team gathered on the county road leading to the Berger Ranch to discuss the execution of the search warrant. The raid team included defendant AUSA McLean (wearing "Federal Agent" emblazoned on the back of his jacket, an ATF baseball cap, and smoking a cigar), defendant agents Hanlon, Scrafford, Branzell and Prieksat, as well as the other Federal and State agents participating in the execution of the search warrant. All or most of these individuals had attended the pre-search briefing.

56. The raid team was accompanied by Hamann and the CNN Camera Crew, acting within the course and scope of their employment for CNN. The CNN Camera Crew videotaped and recorded this gathering.

57. Armed with the warrants and weapons, the defendants and the other Federal and State agents then proceeded in a caravan of approximately ten (10) vehicles to a point on the county road near the Berger Ranch where they were met by a pickup truck driven by Mr. Berger. The caravan was videotaped from the interior of one of the vehicles by a videocamera held by one of the CNN Camera Crew. Another CNN camera was mounted to the exterior of a government vehicle driven by defendant agent Scrafford (and later by defendant agent Branzell), which also videotaped the caravan proceeding down the road. Defendant agent Scrafford was "wired up" with a hidden microphone and transmitter which broadcast audio signals to the CNN Defendants.

58. Upon meeting with Mr. Berger in his pickup truck, the caravan stopped. Defendant agents Scrafford and Branzell exited their vehicle and approached Mr. Berger sitting behind the wheel of his truck. Mr. Berger was then advised that a search warrant was about to be executed at the Berger Ranch. Contrary to the restrictions of the warrant, Mr. Berger was told that the warrant required the search of every building on the ranch. He was not informed abut the seizure warrants.

59. Defendant agents Scrafford, Branzell and Prieksat immediately began interrogating Mr. Berger with leading questions about his alleged use of illegal poisons to bait carcasses, illegal coyote getters, and killing the eagles. Mr. Berger was not advised of his right against self-incrimination at any time during March 24, 1993.

60. Defendant agent Scrafford asked Mr. Berger if he could ride in Mr. Berger's pickup truck back to the Ranch under the pretext that he should explain the situation to Mrs. Berger upon entering the Berger Ranch. The caravan, now including Mr. Berger's truck with defendant agent Scrafford in the passenger seat, resumed its morning procession down the county road and onto the Berger Ranch.

61. Defendant agent Scrafford deliberately concealed and failed to inform Mr. Berger that he was wearing a hidden CNN microphone and that everything Mr. Berger said was being monitored and recorded by the CNN Defendants. Defendant agent Scrafford also deliberately concealed the presence of CNN personnel and the fact that the video camera were those of CNN.

62. Meanwhile, defendant agent Branzell radioed to the other agents that they would have to search "real hard for evidence" of illegal poisoning because Mr. Berger indicated that he had just been released from the hospital within ten days, was bedridden for the last five months, and had no bait stations out. Mrs. Berger, who was also in poor health, had just been released from the hospital a week before the

execution of the search warrant. Mr. Berger was on oxygen and medication.

63. The conversation between Mr. Berger and defendant agents Scrafford, Branzell and Prieksat on the county road and then inside Mr. Berger's pickup truck was not only broadcast by the hidden microphone worn by defendant agent Scrafford, it was videotaped by the CNN Camera Crew. The existence and use of both the hidden microphone and videocamera were not disclosed to Mr. Berger. His conversation was recorded and videotaped without his knowledge or consent. Had Mr. Berger known that defendant agent Scrafford was wearing a microphone, he would have asked him to remove the microphone. Had Mr. Berger known that CNN and the CNN Defendants were videotaping, he would have asked them to leave.

64. Defendants AUSA McLean, agents Hanlon and Scrafford authorized or made it possible for defendant agent Scrafford to wear the concealed microphone which was monitored and recorded by CNN and the CNN Defendants.

65. The Berger residence was specifically excluded from the search warrant. Yet, upon entry onto the Berger Ranch, defendant agents Scrafford and Branzell entered the plaintiffs' residence with Mr. Berger. Conversations inside the residence between defendant agents Scrafford and Branzell and the Bergers were broadcast by agent Scrafford's hidden microphone and recorded by the CNN Defendants. These conversations were recorded by agent Scrafford and the CNN Defendants without the Bergers' knowledge or consent. Had the Bergers known that agent Scrafford was wearing a microphone, they would have asked him to remove the microphone and leave the residence.

66. Mrs. Berger was not advised of her right against self-incrimination at any time during March 24, 1993.

67. The entire 75,000 acre Berger Ranch was searched on land and by air for approximately eight hours. During said period of time, the CNN Defendants made up to eight

more hours of videotape and recordings, which included conversations with Mr. and Mrs. Berger inside the residence, of Mr. Berger inside the outbuildings and outside at various locations throughout the Ranch, as well as interviews with defendant AUSA McLean and other Government Defendants.

68. At one point inside an outbuilding on the Berger Ranch, Mr. Berger discovered the videocamera and protested about being filmed. To avoid a confrontation, Hamann deftly directed the camera to shoot the contaminants team across the room while the Government Defendants diverted Mr. Berger's attention by bombarding him with conversation and leading questions about using poisons. Defendant's failure to identify Hamann and the CNN Camera Crew was deliberate and deceitful.

69. The local sheriff was not advised in advance about the execution of the search warrant at the Berger Ranch. Mrs. Berger was allowed to call the sheriff only after defendant agents Scrafford and Branzell entered the Berger residence. When deputy sheriffs finally arrived, defendant agent Hanlon advised them of the number of Federal and State agents involved, but deliberately withheld informing them that the CNN Defendants were on the Berger Ranch.

70. Plaintiffs reasonably believed that the CNN Defendants were law enforcement agents executing the search warrant. Everyone involved in the search wore "street" clothes; some, but not all, wore jackets with "Federal Agent" printed on the back; and some wore yellow protective clothing over their street clothes.

71. Plaintiffs were never advised by the Government Defendants that the CNN Defendants were on the Berger Ranch. Nor did the CNN Defendants identify themselves to plaintiffs. Plaintiffs never gave permission to be videotaped or recorded. Had they known that Hamann and the CNN Camera Crew were not an authorized part of the raid team, they would never have allowed them onto the Berger Ranch and would never had allowed them to videotape and record

any conversations. Had plaintiffs understood the nature of the ensuing events, they would have demanded that the CNN Defendants stop and leave the Berger Ranch.

72. Notwithstanding the lack of permission, the CNN Defendants remained at the Berger Ranch, entered various outbuildings, freely moved throughout various locations on the Berger Ranch, and videotaped and recorded the execution of the search warrant.

73. The warrant only authorized a search of the Berger Ranch, not personal use of the plaintiffs' property by the defendants. Yet, the CNN Camera Crew freely followed and videotaped and recorded the Government Defendants and agents executing the search warrant while Hamann interviewed the Government Defendants about rogue ranchers who illegally kill eagles, in general, and specifically solicited comments about Mr. Berger.

74. Defendant AUSA McLean, who was the Assistant United States Attorney in charge of the criminal investigation, was one of several defendants interviewed by Hamann for the CNN camera during the search. McLean pontificated by issuing a verbal indictment against Mr. Berger to create a CNN sound bite:

> It's not right that a select few people, like . . . uh, this case, can deprive the rest of us seeing a bald eagle swooping down and taking a salmon out of a stream. You can't put a price on that.
>
> * * *
>
> A lot of this, uh, I think is, uh, just that mentality that it's almost a God-given right to control predators. Even, uh, regardless if they're actually taking lambs. I think that's the situation we have here. You've seen Mr. Berger earlier, that's his attitude. It's a -- it's a God-given right to do it.

75. At the time of the interview, no formal criminal charges had yet been brought against Mr. Berger. Defendant AUSA McLean justified the interview on the grounds that

publicity would deter future conduct by other "rogue" ranchers. McLean also highlighted his background in wildlife biology and noted his desire to prosecute carcass-bating cases as doing his "bit" for the environment.

76. Defendant AUSA McLean and the other Government Defendants caused the execution of the search warrant on the Berger Ranch to be videotaped and recorded for the purpose of facilitating CNN and TBS' publishing all or part of the video footage and sound recordings for CNN and TBS programs entitled "Earth Matters" and "Network Earth," and selling all or part of the video and sound footage to other programming affiliates or enterprises including cable, television or film programs.

77. Other Government Defendants were also interviewed on camera. Each contributed through interviews or actions on camera to the production of the CNN segment.

78. The CNN Defendants used the videotape and recordings made during the execution of the search warrant on the Berger Ranch to prepare a program segment that was to be used for broadcast. The segment included footage of the secretly recorded conversations between Mr. Berger and the Government Defendants (including conversations on defendant agent Scrafford's secret microphone), video footage of the interiors of the buildings on the Berger Ranch and of various locations on the Berger Ranch property, and footage of this "raid" and execution of the search warrant upon the Berger Ranch.

79. On May 5, 1993, Mr. Berger was charged under a four count information of violating Federal laws (three counts of "taking" [killing] at least seventeen (17) eagles and one count of violating the Federal Pesticides Control Act).

80. There was no evidence found during the execution of the search warrant on the Berger Ranch that Mr. Berger had killed eagles. The Service's forensic laboratory determined that the "feathers and a few bones" collected by the raid team during the search were misidentified and not

eagle remains. The eagle remains that were identified had no evidence of illegal poison in their remains. Finding some eagle remains after a search of 75,000 acres is hardly surprising or incriminating. As a result, the information was amended on August 27, 1993, and the first three counts were amended downward to alleging the taking of at least one (1) eagle.

81. After trial, the jury acquitted Mr. Berger of the charges that he killed eagles. He was found guilty only of a misdemeanor under the fourth count for using a pesticide contrary to its labelling.

82. The segment was broadcast nationally and internationally. It was broadcast by defendant TBS on October 17, 1993, only three days prior to the sentencing of Paul W. Berger before United States Magistrate Richard Anderson on October 20, 1993. TBS broadcast it again on January 30, 1994. CNN Broadcast the segment on October 24, 1993 and February 4, 1994; it was broadcast on CNN1 twice on October 24, 1994 and twice on February 6, 1994. The segment also aired through TNT Latin America on January 15, 1994 and April 10, 1994. Despite Mr. Berger's acquittal, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of federally-protected eagles.

83. A few days before Mr. Berger's sentencing, defendant agent Hanlon sent a letter, on the United States Department of Interior Fish and Wildlife Service stationery, to "All participants in the Paul Berger (INV.4506A0) eagle poisoning investigation," to announce the broadcast schedule for the segment on TBS and CNN. Defendant agent Hanlon gloated that the broadcast would be widespread; exulting in the worldwide dissemination of the unconstitutionally seized audio and video recordings:

> Again, I want to thank each and everyone of you for your assistance in this complex investigation. If I may use the old saying, reference WAITING UNTIL THE FAT LADY SINGS. SHE SANG. HER VOICE JUST WAS

NOT AS LOUD AS WE WOULD HAVE LIKED!!! I will guarantee you though, that the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD.....Japan, Chile, France, and every place in between.

84. Due to the wrongful actions of TBS, CNN and the CNN Defendants, they have received compensation through the sale of commercials and other compensation, and have thereby been unjustly and unfairly enriched and benefitted as a result of their own wrongful actions.

85. As a direct and proximate result of the search and airing of the program segment about them and the search of the Berger ranch, plaintiffs have suffered extreme distress, humiliation, anguish and embarrassment and fear for their safety and well-being.

86. At no time was there any reasonable cause for the Government and CNN Defendants to believe that plaintiffs consented either to the presence of the CNN Defendants on their Ranch and in their residence, or to videotaping and recording the search of their property and the persons and conversations of Mr. and Mrs. Berger.

87. At no time was there any reasonable cause for the CNN Defendants to believe that plaintiffs consented to the use, sale or distribution of any portion of any videotape or recording made during the execution of the search warrant on the Berger Ranch.

FIRST CAUSE OF ACTION
VIOLATION OF FOURTH AMENDMENT
Search and Seizure; Privacy
(By Plaintiffs against All Defendants)

88. Plaintiffs reallege the allegations of paragraphs 1 through 87 hereinabove and incorporate them by this reference as though fully set forth herein.

89. At all times relevant to the allegations of this Complaint, each and every act alleged herein was done by

and in the name of the United States by defendants AUSA McLean, agents Hanlon, Scrafford, Branzell and Prieksat, individually and through their agents, servants, and representatives, and each of them, under the color and pretenses of the statutes, laws, regulations, customs and usages of the United States.

90. At all times relevant to the allegations of this Complaint, each and every act alleged herein done by CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, were acting by agreement and as joint participants with individual defendants AUSA McLean, defendant agents Hanlon, Scrafford, Branzell and Prieksat, when they trespassed upon plaintiffs' real property and videotaped and recorded the execution of a search warrant by the Government Defendants on plaintiffs' real property for their mutual benefit. Defendants videotaped and recorded the Agents' search of plaintiffs' real and personal property, and the persons and statements of Mr. and Mrs. Berger. In doing so, defendants unlawfully searched and seized private images and statements of plaintiffs in violation of their constitutional rights.

91. The acts of CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, were clearly supported by the power, property and prestige of the Federal Government, and imbued them with the power and prestige of Government officials. As a consequence, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, were acting under the color of the Federal Law and pretenses of the statutes, laws, regulations, customs and usages of the United States.

92. CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, broadcast said videotaped private images and recordings for defendants' own use and

for their own benefit and profit in violation of plaintiffs' privacy.

93. The action against defendant AUSA McLean, defendant agents Hanlon, Scrafford, Branzell and Prieksat and CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, for Fourth Amendment violations under color of Federal Law arises under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny.

94. Defendant AUSA McLean and defendant agents Hanlon, Scrafford, Branzell and Prieksat are not immune to a civil action for Fourth Amendment violations by Federal officers acting in their official capacity. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

95. Damages are an appropriate and judicially manageable remedy for an invasion of personal interests in liberty, for the case presents a focused remedial issue without difficult questions of the causation and valuation, and there are no applicable special factors counseling hesitation in the absence of affirmative action by Congress.

96. Pursuant to the illegal Letter Agreement, the Government Defendants facilitated the CNN Defendants' unauthorized entry onto the Berger Ranch, illegal search and seizure of videotaped images and recorded statements, under the imprimatur of a search warrant for no legitimate law enforcement purpose. Private images and statements of Mr. and Mrs. Berger and plaintiffs' personal belongings were improperly seized from plaintiffs through the videotaping and secret recording conducted by the CNN Defendants and the Government.

97. The detention of Mr. and Mrs. Berger during the execution of the search warrant was unreasonable and unjustified.

98. The search warrant was executed in a particularly indiscriminate and offensive manner with unnecessary severity and disregard for plaintiffs' privacy.

99. On or about March 24, 1993, defendant agents Scrafford and Branzell entered the Berger residence which was specifically excluded from the search warrant. Plaintiffs did not give permission to defendant agents Scrafford and Branzell to enter their residence. Had plaintiffs known that the search warrant specifically excluded their residence, they would have ordered defendants Scrafford and Branzell to leave.

100. In addition, defendant agent Scrafford wore a hidden microphone into the Berger residence on behalf of and by agreement with the CNN Defendants. All of the statements made by plaintiffs inside their residence were recorded and monitored by the CNN Defendants through defendant agent Scrafford's hidden microphone. At no time did plaintiffs consent to or give permission to have their conversations recorded. The detention of Mr. and Mrs. Berger inside their residence and recording of their statements without their knowledge or consent was unreasonable and unjustified.

101. Defendant AUSA McLean and defendant agents Hanlon, Scrafford, Branzell and Prieksat, were acting by agreement and as joint participants with, and allowed CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees to trespass upon plaintiffs' property for the purpose of videotaping and recording the execution of a search warrant for their mutual benefit in violation of 18 U.S.C. §§ 2234, 2236, 3105 and 3109. Said actions willfully exceeded the authority of defendant AUSA McLean and defendant agents Hanlon, Scrafford, Branzell and Prieksat in executing the search warrant.

102. Because of the above-recited facts, defendant AUSA McLean, defendant agents Hanlon, Scrafford,

Branzell, Prieksat, and CNN, TBS, Hamann, Rainey and Hooper, and each of them, under the color and pretenses of the statutes, laws, regulations, customs and usages of the United States, deprived plaintiffs of their rights, privileges and immunities secured to them by the United States Constitution, including, but not limited to,

a) Plaintiffs' Fourth Amendment right to privacy and security in their person, house, papers, and effects, to be free against unreasonable searches; and

b) Plaintiffs' right to be free in their person against unreasonable seizure.

103. The actions of each defendant violated plaintiffs' clearly established statutory or constitutional rights of which a reasonable person would have known.

104. The actions of defendants impeded and hindered the course of justice with the intent to deny plaintiffs the equal protection of the laws.

105. As a direct and proximate result of the outrageous and wrongful acts of each of the defendants, plaintiffs suffered extreme indignities and humiliation, severe emotional and physical distress, pain and suffering, mental anguish, loss of liberty and loss of standing in the community, and have been held up to ridicule before their peers.

106. Plaintiffs are entitled to recover any and all actual damage, in a sum to be determined according to proof at trial, proximately caused by the wrongful acts hereinabove complained of and alleged herein.

107. Defendant AUSA McLean, and defendant agents Hanlon, Scrafford, Branzell, Prieksat, and CNN, TBS, Hamann, Rainey and Hooper, and each of them, acted willfully, maliciously, intentionally, oppressively, and in wanton and reckless disregard of plaintiffs' constitutional right and of the possible consequences of their conduct. Accordingly, plaintiffs are entitled to and hereby demand

punitive and exemplary damages by way of punishing and deterring defendants in an amount no less than Ten Million Dollars ($10,000,000.00).

108. The actions of the defendants, jointly and severally, entitle plaintiffs to an award of exemplary and punitive damages.

SECOND CAUSE OF ACTION
CONSPIRACY TO VIOLATE FOURTH AMENDMENT
Search and Seizure; Privacy
(By Plaintiffs against all Defendants)

109. Plaintiffs reallege the allegations of paragraphs 1 through 87 hereinabove and incorporate them by this reference as though fully set forth herein.

110. Defendant AUSA McLean and defendant agents Hanlon, Scrafford, Branzell and Prieksat, acting in their official capacity, are not immune to a civil action for conspiracy to violate the Fourth Amendment under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny.

111. CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, were acting under the color of Federal Law and the pretenses of statutes, laws, regulations, customs and usages of the United States, in that defendants' acts were clearly supported by the power, property and prestige of the Federal Government, which imbued them with the power and prestige of Government officials. Accordingly, this action for conspiracy to violate the Fourth Amendment under color of Federal Law is actionable under Bivens v. Six Unknown Names Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), and its progeny.

112. Damages are an appropriate and judicially manageable remedy for an invasion of personal interests in liberty for the case presents a focused remedial issue without difficult questions of causation and valuation and there are no

applicable special factors counseling hesitation in the absence of affirmative action by Congress.

113. On or about Mach 24, 1993, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and defendant AUSA McLean, defendant agents Hanlon, Scrafford, Branzell and Prieksat, and each of them, knowingly and willfully conspired and agreed among themselves to jointly participate, for their mutual benefit, in the execution of the search warrant in and trespass upon plaintiffs' real property and to videotape and record the Government Defendants' execute the search warrant in violation of plaintiffs' Fourth Amendment rights.

114. Defendant AUSA McLean, defendant agents, Hanlon, Scrafford, Branzell and Prieksat, and CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, did the acts and things herein alleged by videotaping and recording the Federal agents' search of plaintiffs' real and personal property, and the persons and statements of Mr. and Mrs. Berger, pursuant to, and in furtherance of, the conspiracy and above-alleged agreement.

115. Defendant AUSA McLean, defendant agents, Hanlon, Scrafford, Branzell and Prieksat, and each of them, furthered the conspiracy by acting as agents of CNN, TBS, Hamann, Rainey and Hooper, and by ratifying and adopting and aiding the conduct of CNN, TBS, Hamann, Rainey and Hooper, and their agents, servants and employees.

116. Because of the above-recited acts and omissions, defendants, and each of them, acting under the color of Federal law and of statutes, ordinances, regulations, customs and usages of the United States, deprived plaintiffs of their rights, privileges and immunities secured to them by the United States Constitution, including, but not limited to:

a) Plaintiffs' Fourth Amendment right to privacy and security in their person, house, papers and

effects, to be free against unreasonable searches; and

b) Plaintiffs' Fourth Amendment right to be free in their person against unreasonable seizure.

117. As a direct and proximate result of the outrageous and wrongful acts of each defendant, plaintiffs suffered extreme indignities and humiliation, severe emotional and physical distress, pain and suffering, mental anguish, loss of liberty and loss of standing in the community, and have been held up to ridicule before their peers.

118. Plaintiffs are entitled to recover any and all actual damage, in a sum to be determined according to proof at trial, proximately caused by the wrongful acts hereinabove complained of, as alleged herein and according to proof at trial.

119. Each defendant acted willfully, maliciously, intentionally, oppressively, and in wanton and reckless disregard of plaintiffs' constitutional rights and of the possible consequences of their conduct. Accordingly, plaintiffs are entitled to and hereby demand punitive and exemplary damages by way of punishing and deterring defendants in an amount of no less than Ten Million Dollars ($10,000,000.00).

120. The actions of the defendants, jointly and severally, entitle plaintiffs to an award of exemplary and punitive damages.

THIRD CAUSE OF ACTION

Trespass

(By Plaintiffs against Defendants AUSA McLean, TBS, Rainey and Hooper)

121. Plaintiffs reallege the allegations of paragraphs 1 through 87 hereinabove and incorporate them by this reference as though fully set forth herein.

122. At all times relevant to the allegations of this Complaint, plaintiffs, Mr. and Mrs. Berger, owned and

possessed the Berger Ranch, generally located north of Sand Springs, Garfield County, Montana. The Berger Ranch house in which plaintiffs reside is generally located in Section 31 of Township 18 North, Range 33 East, M.P.M., surrounded by various outbuildings, and for which plaintiffs had a reasonable expectation of the privacy.

123. On or about March 24, 1993, AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants, and employees, and each of them, intentionally and unlawfully entered upon the plaintiffs' property with the intent to videotape and record the execution of a search warrant by the United States Fish and Wildlife Service of the Department of Interior.

124. Defendant McLean, an Assistant United States Attorney, was not authorized under the search warrant to enter the Berger Ranch during the execution of the search warrant.

125. AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants, and employees, and each of them, intentionally and unlawfully trespassed upon plaintiffs' property, entered buildings upon the Berger Ranch, traveled throughout and remained upon the Berger Ranch for approximately six to eight hours, videotaped and recorded numerous places and locations upon the Berger Ranch, videotaped and recorded the execution of the Federal search warrant upon the Berger Ranch, and thereafter broadcast the videotape obtained while on the Berger Ranch. Such actions by CNN, TBS, Hamann, Rainey and Hooper took place upon the real property owned and possessed by plaintiffs.

126. At no time did AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, identify themselves as anyone other than Government representatives present for the purpose of executing the search warrant.

127. At no time did plaintiffs consent to or authorize AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, or

their agents', servants' and employees' entry and presence in plaintiffs' real property or the videotaping and recording of plaintiffs' real and personal property and the persons of Mr. and Mrs. Berger.

128. The trespass by AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, onto plaintiffs' real property, as well as their subsequent failure to stop videotaping and recording, was intentional and in reckless and willful disregard of plaintiffs' rights.

129. As a direct and proximate result of the trespass by AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, plaintiffs have suffered actual and consequential damages including, but not limited to, damage to real property, emotional distress, embarrassment, humiliation and loss of privacy. Plaintiffs' are entitled to recover for damage to the premises and other actual damages, including, but not limited to, severe mental anguish, severe emotional and physical distress, pain and suffering, and humiliation and embarrassment, to be determined and according to proof at trial. The amount of the damages will be to compensate for all detriment proximately caused thereby.

130. As a result of the wrongful actions of AUSA McLean, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, said defendants are guilty of actual malice pursuant to Section 27-1-221, MCA, due to the defendants having knowledge of facts or intentionally disregarding facts that create a high probability of injury to the plaintiffs and deliberately proceeded to act in conscious or intentional disregard of the high probability of the injury to the plaintiffs or deliberately proceeded to act with indifference to the high probability of injury to the plaintiffs. Consequently, plaintiffs are entitled to and hereby demand

punitive and exemplary damages by way of punishing and deterring defendants, pursuant to Section 27-1-221, MCA, in an amount of no less than Ten Million Dollars ($10,000,000.00).

131. The actions of the defendants jointly and severally, entitle plaintiffs to an award of exemplary and punitive damages.

FOURTH CAUSE OF ACTION

Conversion

(By Plaintiffs against Defendants TBS, Rainey and Hooper)

132. Plaintiffs reallege the allegations of paragraphs 1 through 87 hereinabove and incorporate them by this reference as though fully set forth herein.

133. At all times relevant to the allegations of this Complaint, plaintiffs, Mr. and Mrs. Berger, owned and possessed the Berger Ranch, generally located north of Sand Springs, Garfield County, Montana. The Berger Ranch house in which plaintiffs reside is generally located in Section 31 of Township 18 North, Range 33 East, M.P.M., surrounded by various outbuildings, and for which plaintiffs had a reasonable expectation of privacy.

134. On or about March 24, 1993, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, intentionally and unlawfully entered plaintiffs' Ranch and without consent or permission, wrongfully seized, took and appropriated, by means of videotape and sound recording, private images of plaintiffs, their premises and possessions and plaintiffs' statements, including, but not limited to, images of Mr. Berger, sound recordings of Mr. and Mrs. Berger responding to the agents or reacting to their presence with the CNN Camera Crew, and images of their personal and real property.

135. CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, converted said private images

and recordings into a videotape for defendants' own use and for their own benefit and profit.

136. As a direct and proximate result of said conversion, plaintiffs have been damages in an amount to be determined according to proof at trial.

137. The acts of CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, were oppressive and malicious. Accordingly, plaintiffs are entitled to and hereby demand punitive and exemplary damages by way of punishing and deterring defendants in an amount of no less than Ten Million Dollars ($10,000,000.00).

138. The actions of the defendants, jointly and severally, entitle plaintiffs to an award of exemplary and punitive damages.

FIFTH CAUSE OF ACTION

Intentional Infliction of Emotional Distress

(By Plaintiffs against Defendants TBS, Rainey and Hooper)

139. Plaintiffs reallege the allegations of paragraphs 1 through 87 hereinabove and incorporates them by this reference as though fully set forth in this paragraph.

140. On or about March 24, 1993, CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, intentionally and without permit or license or the consent of plaintiffs, trespassed upon and entered the Berger Ranch and without provocation, in a malicious, rude, and insolent manner, menaced, intimidated and threatened plaintiffs emotionally and physically by their presence and with their camera equipment.

141. Defendants knew or should have known that an elderly man and woman in poor health would be extremely distressed, upset, and disoriented while approximately twenty strange individuals ransacked through their real and personal property, interrogated them, and would suffer emotional and physical distress. Defendants also knew that their entry onto

the Berger's home, exacerbated by their surreptitious eavesdropping and recording of Plaintiffs' conversations and the subsequent broadcast of those conversations, would injure the Bergers. Defendants were repeatedly warned that plaintiffs were in very poor health and possible fragile state of mind.

142. On or about March 24, 1993, at approximately 6:00 a.m., Mr. Berger was driving in his pickup truck down the county road leading from his Ranch when he was met by a caravan of approximately ten (10) vehicles and asked to stop the engine by defendant agent Scrafford. He was then informed that a Federal Judge ordered that a search warrant be executed on his Berger Ranch to look for evidence of illegal poisons, illegal coyote getters and dead eagles. He was interrogated in detail by several of the Government Defendants including defendant agents Scrafford, Branzell and Prieksat. Mr. Berger's interrogation was continued by defendant agent Scrafford as he was accompanied back to the Berger Ranch in his pickup truck and into his residence where Mrs. Berger was located. Unbeknownst to Mr. and Mrs. Berger, their conversations were recorded by a hidden microphone worn by defendant agent Scrafford and monitored and recorded by the CNN defendants. Mr. Berger was also videotaped by the CNN Defendants without his knowledge and permission but with the cooperation and consent of the Government Defendants.

143. Defendant AUSA McLean, and defendant agents Hanlon, Scrafford, Branzell and Prieksat, without provocation, menaced, intimidated and threatened plaintiffs by the manner in which they conducted the execution of the search warrant, interrogated plaintiffs and allowed the CNN Defendants to direct and conduct the videotaping and recording of the execution of the search warrant. CNN, TBS, Hamann, Rainey and Hooper, confirmed and ratified that conduct, with knowledge that plaintiffs' emotional and physical distress would thereby increase, and was done with a

wanton and reckless disregard of plaintiffs' rights and of the consequences to plaintiffs. Such conduct was intentional and malicious and one for the purpose of causing plaintiffs to suffer humiliation and mental anguish and emotional and physical distress. Defendant AUSA McLean, and defendant agents Hanlon, Scrafford, Branzell and Prieksat, and each of them, were acting as agents for CNN, TBS, Hamann, Rainey and Hooper.

144. CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, purposefully and intentionally engaged in outrageous acts which they knew or should have known would cause plaintiffs to suffer severe emotional and physical distress, pain and suffering. These acts include, but are not limited to (1) the unauthorized entry into plaintiffs' Ranch; (2) the unauthorized videotaping and recording of plaintiffs; (3) the videotaping and recording of plaintiffs' person, private possessions and statements; (4) the outrageous actions of the Government Defendants causing plaintiffs emotional and physical distress; (5) videotaping and recording of the search and interviews with the Government Defendants in response to questions posed by defendant Hamann which imputed guilt of criminal activity to the plaintiffs; and (6) broadcasting the videotape and recordings of plaintiffs made during the execution of the search warrant nationally and internationally, for the purpose of making an example of plaintiffs.

145. The conduct of CNN, TBS, Hamann, Rainey and Hooper, individually, and through their agents, servants and employees, and each of them, shocks the conscience and was done for the purpose of causing plaintiffs to suffer humiliation and mental anguish and emotional and physical distress, and was done with a wanton and reckless disregard of plaintiffs' Federal and State constitutional and other rights and of the consequences to plaintiffs. Defendants' conduct was so outrageous in character and so extreme in degree, as

to go beyond all possible bounds of decency, and is to be regarded as atrocious, and utterly intolerable in a civilized community. Moreover, defendants' conduct resulted in physical and mental injury, and constituted a substantial invasion of a legally protected interest, that caused a significant impact, including emotional distress so severe that no reasonable person could be expected to endure it.

146. As a proximate result of the aforementioned facts, plaintiffs suffered mental anguish, and emotional and physical distress, and has been injured in mind and body.

147. As a direct and proximate result of defendants' intentional infliction of emotional distress, plaintiff have been damaged in an amount to be determined according to proof at trail pursuant to 27-1-317, MCA.

148. Plaintiffs are informed and believe and thereon allege that they will continue to suffer extreme mental, physical and nervous pain and suffering in the future as a result of the injuries alleged herein. The exact amount of such damages is not known to plaintiffs at this time, and plaintiffs will move to amend this Complaint, to state such amount when the same becomes known to them, or on proof thereof.

149. As a further proximate result of defendant's intentional infliction of emotional distress, plaintiffs have incurred, and will continue to incur special damages. The full amount of such damages is not known to plaintiffs at this time and plaintiffs will seek to leave to amend this Complaint, to state such amount when the same becomes known to them, or on proof thereof.

150. The acts of CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, were oppressive and malicious. Accordingly, plaintiffs are entitled to and hereby demand punitive and exemplary damages by way of punishing and deterring defendants in an amount of no less than Ten Million Dollars ($10,000,000.00).

151. The actions of the defendants, jointly and severally, entitle plaintiffs to an award of exemplary and punitive damages.

SIXTH CAUSE OF ACTION

Declaratory Judgment

(By Plaintiffs against all Defendants)

152. Plaintiffs reallege the allegations of paragraphs 1 through 151 hereinabove and incorporate them by this reference as though fully set forth herein.

153. Plaintiffs seek a declaration pursuant to 28 U.S.C. § 2201 that defendant AUSA McLean and defendant agents Hanlon, Scrafford, Branzell and Prieksat, and each of them, violated plaintiffs' Fourth Amendment Constitutional rights to be free from unreasonable searches and seizures, and violated plaintiffs' privacy by agreeing with and permitting CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents and employees, and each of them, to enter plaintiffs private Ranch and residence without their consent and videotape and record the execution of a search warrant.

154. Plaintiffs seek a further declaration pursuant to 28 U.S.C. § 2201 that CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, violated plaintiffs' legal and constitutional rights when they entered plaintiffs' Ranch and residence without privilege or consent to videotape and record plaintiffs' persons, statements and personal belongings and the execution of the search warrant; videotaped and recorded private images of plaintiffs in the privacy of their home; and videotaped and recorded the Government Defendants actions and statements upon their property.

155. Plaintiffs seek a further declaration that the conduct of defendants CNN, TBS, Hamann, Rainey and Hooper, individually and through their agents, servants and employees, and each of them, shocks the conscience and caused or was done for the purpose of causing plaintiffs to

suffer humiliation and mental anguish and emotional or physical distress, and caused or was done with a wanton and reckless disregard of plaintiffs' Federal and State constitutional and other rights and of the consequences to plaintiffs. Defendants' conduct was so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and is to be regarded as atrocious, and utterly intolerable in a civilized community. Moreover, defendants' conduct resulted in physical and mental injury, and constituted a substantial invasion of a legally protected interest, that caused a significant impact, including emotional distress so severe that no reasonable person could be expected to endure it.

156. A judgment declaring the illegality and unconstitutionality of the tactics and policies employed in the instant situation is necessary to protect the citizens of this District, including plaintiffs, and this nation, to avoid future irreparable harm and injury.

SEVENTH CAUSE OF ACTION

Injunction

(By Plaintiffs against all Defendants)

157. Plaintiffs reallege the allegations of paragraphs 1 through 156 hereinabove and incorporate them by this reference as though fully set forth herein.

158. Plaintiffs are threatened with the possibility that CNN, TBS, Hamann, Rainey and Hooper, and/or their agents, servants and employees, will continue to publish the videotape and recordings or sell all or portions of the video footage and recorded conversations.

159. Defendants' conduct and threatened conduct, unless and until enjoined and restrained by order of this Court, will continue to cause great and irreparable injury to plaintiffs in that plaintiffs will suffer continued anxiety, humiliation, embarrassment, hurt feelings, mental anguish, severe emotional and physical distress, pain and suffering.

160. Plaintiffs have no adequate remedy at law for the injuries they will suffer in that a judgment for monetary damages with respect to the videotape will not end the potential for defendants' publication or sale thereof and will not end the threatened future invasion of plaintiffs' privacy.

161. Accordingly, plaintiffs seek and are entitled to a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining TBS, Rainey and Hooper, and their agents, servants and employees, and each of them, and all persons acting under, in concert with, or for them, from publishing or selling, in whole or in part, videotaped images of the pre-search briefing made on or about March 23, 1993, and of the execution of the search warrant within and without plaintiffs' Ranch made on or about March 24, 1993, and any other videotape and recordings that defendants made pertaining to the execution of the search warrant at the Berger Ranch on or about March 24, 1993.

EIGHTH CAUSE OF ACTION

VIOLATION OF 18 U.S.C. § 2511(2)(d)

Interception of Oral Communications

(By Plaintiffs against Defendants Turner Broadcasting Systems, Inc., Robert Rainey and Donald Hooper)

162. Plaintiffs reallege the allegations of paragraphs 1 through 34, 44 through 63 and 65 through 87 hereinabove and incorporate them by this reference as though fully set forth herein.

163. 18 U.S.C. § 2511(1)(a) and (b) prohibit any person from intercepting, procuring another person to intercept, intentionally using or procuring another person to use "any electronic, mechanical, or other device" to intercept, "any wire, oral, or electronic communication" except as otherwise provided by the statute.

164. 18 U.S.C. § 2511(1)(c) and (d) prohibit any person from intentionally disclosing or using the contents of "any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained

through the interception of a wire, oral, or electronic communication in violation of . . . ." 18 U.S.C. § 2511.

165. 18 U.S.C. § 2510(2) defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ."

166. 18 U.S.C. § 2510(5) defines "electronic, mechanical, or other device" as "any device or apparatus which can be used to intercept a wire, oral or electronic communication . . . ."

167. 18 U.S.C. § 2510(6) defines "person" as "any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation . . . ."

168. 18 U.S.C. § 2510(8) defines "contents . . . with respect to any wire, oral, or electronic communication" as "any information concerning the substance, purport, or meaning of that communication . . . ."

169. 18 U.S.C. § 2520(a) creates a civil cause of action for any person whose "wire, oral, or electronic communication" has been "intercepted, disclosed, or intentionally used" in violation of the Federal wiretap statute, 18 United States Code §§ 2510, et seq. 18 U.S.C. § 2520(b) provides that appropriate relief in a civil action under Section 2520 includes appropriate equitable or declaratory relief, actual damages and punitive damages, reasonable attorney's fees and other costs of litigation.

170. 18 U.S.C. § 2511(2)(c) excepts from the Federal ban on wiretapping without a court ordered warrant persons "acting under color of law ... where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception . . . ."

171. 18 U.S.C. § 2511(2)(d) excepts from the Federal ban on wiretapping without a court ordered warrant

persons "not acting under color of law ... where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."

172. By secretly recording plaintiffs' conversations with Government defendants and others described in detail hereinabove, defendants Rainey and Hooper, and defendant TBS, through their own actions and/or the actions of their agents, representatives, co-conspirators and/or accessories, all "person" under 18 U.S.C. § 2510(6), intercepted and/or procured another person to intercept plaintiffs' oral communications in violation of 18 U.S.C. § 2511.

173. By secretly recording plaintiffs' conversations with Government defendants and others described in detail hereinabove, defendants Rainey and Hooper, and defendant TBS, through their own actions and/or the actions of their agents, representatives, co-conspirators and/or accessories, intentionally used or procured another person to use an electronic, mechanical, or other device to intercept plaintiffs' oral communications.

174. By broadcasting and facilitating the broadcasting of portions of the plaintiffs' illegally intercepted oral communications and/or information derived therefrom on the TBS and CNN television stations, on affiliate stations and other broadcast media worldwide, defendants TBS, Rainey and Hooper intentionally disclosed and used the contents of plaintiffs' illegally intercepted oral communications, knowing or having reason to know that the information was obtained through the interception of an oral communication in violation of 18 U.S.C. § 2511. By providing plaintiffs' illegally intercepted oral communications to CNN, TBS, its subsidiaries, affiliates and others for the purpose of editing and broadcast, defendants

Rainey and Hooper and defendant TBS by and through its agents, representatives and employees intentionally disclosed and used the contents of plaintiffs' illegally intercepted oral communications, knowing or having reason to know that the information was obtained through the interception of an oral communication in violation of 18 U.S.C. § 2511.

175. Plaintiffs are persons exhibiting an expectation that such communications are not subject to interception under circumstances justifying such expectation. At all times throughout the lengthy search and other preliminary confrontations described hereinabove, plaintiffs maintained a legitimate and reasonable expectation of privacy in their conversations with others. The search warrant did not authorize the videotaping or recording of the agents' search of the Berger Ranch. Notwithstanding plaintiffs' privacy interests, defendants surreptitiously recorded various statements of, and conversations with plaintiff Paul W. Berger, including the conversation between Mr. Berger and Government defendants which occurred on the road near the Berger Ranch. If Mr. Berger had known his statements and conversations were being recorded, he would have objected to the recording and demanded that it stop.

176. Defendants, either directly or through their agents, representatives, co-conspirators and accessories, further surreptitiously recorded statements or, and conversations with, plaintiffs Paul W. Berger and Erma R. Berger inside the Berger residence. The Berger residence was specifically excluded from the search warrant. Yet, upon entry onto the Berger Ranch, Government defendants Scrafford and Branzell entered the plaintiffs' residence with Mr. Berger. Conversations inside the residence between defendant agents Scrafford and Branzell and the Bergers were intercepted and transmitted by agent Scrafford's hidden microphone to, and recorded and broadcast by defendants, either directly or through their agents, representatives, co-conspirators and accessories without the Bergers' knowledge

or consent. Had the Bergers known that agent Scrafford was wearing a microphone, they would have asked him to remove the microphone and leave the residence. Plaintiffs never gave permission to be videotaped or recorded.

177. 18 U.S.C. § 2511(2)(c) does not except defendants TBS, Rainey or Hooper from liability under the Federal wiretap statute because neither TBS, Rainey, Hooper nor other CNN employees were parties to the illegally intercepted oral communications and neither TBS, Rainey, Hooper nor other CNN employees were "acting under color of law" for the purpose of 18 U.S.C. § 2511(2)(c). Defendants TBS, Rainey and Hooper, their agents, representatives, co-conspirators and accessories, were not authorized by the search warrant or otherwise by law to secretly record and intercept plaintiffs' oral communications. Plaintiffs' oral communications were secretly intercepted for broadcast to the world and for financial profit -- not for any law enforcement purpose. Defendants' abuse of Federal authority to gain illegal access to the plaintiffs' private property during the execution of the search warrant, although sufficient to establish they acted under color of Federal law and thus committed "state action" in violation of plaintiffs' Constitutional Fourth Amendment rights under Bivens, does not establish defendants acted "under color of law" for the purpose of the Federal wiretap statute.

178. 18 U.S.C. § 2511(2)(d) does not except defendants TBS, Rainey and Hooper from liability under the Federal wiretap statute because neither TBS, Rainey, Hooper nor other CNN employees were parties to plaintiffs' illegally intercepted oral communications and the communications were intercepted for the purpose of committing the following criminal or tortious acts in violation of the Constitution or laws of the United States and Montana:

(A) Violation of, and conspiracy to violate plaintiffs' rights under the Fourth Amendment to the United States Constitution arising under

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotic, 403 U.S. 388 (1971). Plaintiffs reallege the allegations of paragraphs 88 through 120 hereinabove and incorporate them by this reference as though fully set forth herein;

(B) Violation of plaintiffs' right to privacy arising under the Montana Constitution, Article II, Section 10;

(C) Aiding and abetting the Government defendants as accessories to violate 18 U.S.C. § 2234 which makes criminal and willful exceeding of authority in executing a search warrant, specifically by secretly recording and intercepting plaintiffs' oral communications inside the Berger residence which was excluded from the search warrant;

(D) Aiding and abetting the Government defendants as accessories to violate 18 U.S.C. § 2236 which makes criminal the search of a private dwelling without a search warrant except under limited circumstances which do not apply to defendants' actions;

(E) Conversion of plaintiffs' secretly recorded and illegally intercepted oral communications into videotapes and broadcasts for the benefit, use and profit of TBS, Rainey, Hooper, CNN, Hamann and other private persons. Plaintiffs reallege the allegations of paragraphs 133 through 138 hereinabove and incorporate them by this reference as though fully set forth herein;

(F) Intentional infliction of emotional distress to the elderly plaintiffs. Plaintiffs reallege the allegations of paragraphs 139 through 151

hereinabove and incorporate them by this reference as through fully set forth herein.

179. As a direct and proximate result of the outrageous and wrongful acts of each of the defendants, plaintiffs suffered extreme indignities and humiliation, severe emotional and physical distress, pain and suffering, mental anguish, loss of liberty and loss of standing in the community, and have been held up to ridicule before their peers.

180. Plaintiffs did not have a reasonable opportunity to discover defendants' violation of 18 U.S.C. § 2511 until at least August, 1993 when the videotapes created by CNN and containing the illegally intercepted oral communications were produced to Mr. Berger's attorneys by CNN, less than two years prior to filing of this Complaint. 18 U.S.C. § 2520(e).

181. Plaintiffs are entitled to recover any and all actual damage, in a sum to be determined according to proof at trial, proximately caused by the wrongful acts hereinabove complained of and alleged herein.

182. Defendants TBS, Rainey and Hooper, in using and disclosing plaintiffs' illegally intercepted oral communications, and in intercepting those communications either directly or by and through defendants' agents, representatives, co-conspirators and accessories, acted willfully, maliciously, intentionally, oppressively, and in wanton and reckless disregard of plaintiffs' constitutional rights and of the possible consequences of their conduct. Accordingly, plaintiffs are entitled to and hereby demand punitive and exemplary damages by way of punishing and deterring defendants in an amount no less than Ten Million Dollars ($10,000,000.00).

183. The actions of the defendants, jointly and severally, entitle plaintiffs to an award of exemplary and punitive damages against defendants TBS, Rainey and Hooper.

184. Plaintiffs are further entitled to an award of reasonable attorney's fees and other costs of litigation.

185. Plaintiffs are further entitled to injunctive relief preventing defendant TBS and any of its subsidiaries and affiliates, and defendants Rainey and Hooper, from using or disclosing plaintiffs' illegally intercepted oral communications and any of their contents.

WHEREFORE, plaintiffs pray for judgment against defendants, and each of them, jointly and severally, as follows:

A. For general, special and future damages, inclusive of damages for emotional distress, in an amount to be determined according to proof;
B. For exemplary and punitive damages in an amount of no less than Ten Million Dollars ($10,000,000.00);
C. For a declaratory judgment as described in the Sixth Cause of Action;
D. For temporary restraining order and preliminary and permanent injunction preventing TBS, Rainey and Hooper, individually and through their agents, servants and employees, from broadcasting or selling all or part of videotape and recordings;
E. That defendants be required to pay the full costs of this action and plaintiffs' attorneys fees, according to proof at trial; and
F. That plaintiffs have such other and further relief as the Court may deem proper.

DATED: May 16, 1995

RESPECTFULLY SUBMITTED,

MOSES LAW FIRM

By _____/s/_____
Jay F. Lansing

Jay F. Lansing
Charles F. Moses
Post Office Box 2533
Billings, Montana 59103
(406) 248-7702

ROSSBACHER & ASSOCIATES
Henry H. Rossbacher
Nanci E. Nishimura
Tracy W. Young
Union Bank Building, 24th Fl.
445 South Figueroa Street
Los Angeles, California 90071
(213) 895-6500

Attorneys for Plaintiffs

DEMAND FOR JURY TRIAL

186. Plaintiffs in the above-entitled action request a trial by jury as provided by Amendment VII of the United States Constitution and by Rule 38 of the Federal Rules of Civil Procedure.

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

[Exhibit A to First Amended Complaint]

ONE CNN CENTER, Box 105366, Atlanta, GA 30348-5365
(404) 827-1500

ENVIRONMENT UNIT: EARTH MATTERS/NETWORK EARTH
JACK HAMANN, Correspondent
953 W. Emerson St., Seattle, WA 98119-1419
(206) 285-0418 (404) 827-4023

March 11, 1993

Kris McLean
Assistant United States Attorney
District of Montana
100 N. Park Ave.
Helena, Montana 59601

Dear Mr. McLean:

This confirms our agreement that the United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS agents as they attempt to execute a criminal search warrant near Jordan, Montana, sometime during the week of March 22, 1993. Except as provided below, CNN shall have complete editorial control over any footage it shoots; shall not be obligated to use the footage; and does not waive any rights or privileges it may have with respect to the footage.

In return, CNN agrees to embargo the telecast of any videotape of the attempt to execute the search warrant until either:

1. A jury has been empaneled and instructed by a judge not to view television reports about the case; or
2. The defendant waives his right to a jury trial and agrees to have his case tried before a judge; or

3. A judge accepts a plea bargain; or
4. The government decides not to bring charges relating to the attempt to execute the search warrant.

Please acknowledge your agreement to the foregoing by executing the signature line below.

Sincerely,

/s/
Jack Hamann
Correspondent,
CNN Environment Unit

Acknowledged:

/s/
Kris McLean
Assistant United States Attorney
for the District of Montana
Helena, Montana

cc: Jennifer Falk Weiss, CNN Legal Dept.
Chet Burgess, CNN Environment Unit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PAUL W. BERGER and ERMA R. BERGER, Plaintiffs, vs. RODNEY C. HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELI., ROBERT PRIEKSAT, KRIS A. M:LEAN, TURNER BROADCASTING SYSTEMS, INC., a Georgia corporation, ROBERT RAINEY, and DONALD HOOPER, Defendants.	) Case No. CV 95-046-BLG-JDS) AFFIDAVIT OF PAUL W. BERGER

STATE OF MONTANA)
: SS.
COUNTY OF GARFIELD)

I, Paul W. Berger, being first duly sworn, declare:

1. I am the Plaintiff in the above-entitled action, along with my wife, Erma R. ("Rosie") Berger. The facts set forth are based on my personal knowledge and if called to testify, I could and would competently do so under oath. This affidavit is submitted in support of Plaintiffs' Opposition to the Brief in Support of the Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment in CV 95-46-BLG-JDS and Plaintiffs' Opposition to Motion for Summary Judgment by Cable News Network, Inc. and Jack Hamman in CV 94-46-BLG-JDS.

2. At approximately 6:00 a.m. on the morning of March 24, 1993, my neighbor called me on the telephone and

advised me that a group of law enforcement agents were gathering on the county road leading to my ranch.

3. I drove down the county road to see what the matter was all about with the law enforcement agents and met up with a convoy of many vehicles.

4. As I sat in the cab of my truck, I was approached by several agents. One of them identified himself as Special Agent Scrafford who advised me that he was in charge and had obtained a search warrant that was about to be executed at my ranch. I was shown a copy of the first page of a search warrant.

5. Special Agent Scrafford instructed me to drive back to my ranch so that the search could begin and asked if he could ride back to the ranch with me in my truck and I obliged. He told me that I had to do as he said. I did not know at the time that Special Agent Scrafford was wearing a hidden microphone for Cable News Network.

6. Upon entering my ranch, Special Agents Scrafford and Branzell followed me into the house. Agent Scrafford or Branzell was with me all day. In fact, Agent Scrafford followed me in and out of the house all day, including following me into the house for me to go to the bathroom, which occurred frequently because of my medication. It never occurred to me that I had a right to refuse to allow any of them into my house after I was told that the agents had a warrant, and I was followed home by a caravan of government vehicles filled with law enforcement agents wearing weapons, and being escorted by a Federal agent back to my ranch in my own truck. The agents did not ask me for permission to enter my house, nor did they ask permission of my wife to enter the house.

7. I was told by Agent Scrafford that the Court ordered a search of every building on my ranch. I was not told that the house was specifically excluded from search.

8. It was unknown to me at the time that the agents inside of the house were recording conversations of me and

my wife. Had I know this, I would never have allowed him to continue recording our conversations.

9. At no time during the entire day, were my wife and I advised of any rights. We were never told, for example, that we had a right to refuse to answer questions.

10. I was asked to accompany agents searching the ranch to the shed where I stored chemicals. While inside the shed, I noticed a man aiming a large camera at me; there was another man holding a large microphone. I did not know at the time that a cameraman for Cable News Network was brought onto the ranch by the Federal agents to videotape and record the search.

11. I assumed that everyone on our ranch, including the Cable News Network camera crew, were law enforcement agents conducting the search and I was never told anything by these people to believe otherwise. At no time did they identify themselves as Cable News Network; nor did any of the law enforcement agents conducting the search ever tell me that they were members of the news media or Cable News Network.

12. Everyone who came onto the ranch that morning wore work clothes and all looked the same. Only some of them wore jackets with law enforcement identification on the back, but I had no reason to believe that there were people on the ranch who were not law enforcement.

13. My wife and I were never asked and never gave permission to allow any news media, including Cable News Network, onto our ranch to videotape or record the search. We were also never asked and never gave permission to Cable News Network to use or, in any way distribute, any part of any videotape or audio recordings obtained during the search of our ranch on March 24, 1993.

14. During the entire time that the search was taking place, I was asked a lot of questions by the agents, including Agent Scrafford, who were trying to elicit answers from me, including about using pesticides on carcasses.

15. At no time was I told that my wife and I were free to leave while the search was taking place. At no time did I feel that my wife and I were free to leave. We cooperated and did not resist. After all, we were not left alone by the agents, all of whom wore weapons, the entire time of the search. Agent Branzell told me that he would have to be with me all day. I was told by Agent Scrafford that if I didn't do as he said, he would run me down to the lockup in Billings.

16. During the search, the agents left open the gates we use to fence in our thousands of sheep for breading and management control. The agents and their trucks frightened the sheep who fled through the open gates into a mixed mob. It took me and my hands months to sort them out.

17. I am 74 years old and in poor health. At the time of the search, I was on oxygen and medication and had just returned home ten days earlier after spending the previous five months in and out of the hospital. I was very upset by the search and could not control my shaking. My wife, Rosie, is 84 years old and also in poor health; she was just released from the hospital a week before the search of our ranch.

18. My wife and I have always preferred to live out in the country, away from cities and towns. Part of living out here is the right to be left alone. What we say and do and how we live is our private life and not for the world to see. Throughout our ranch, we have put up "Private, No Trespassing" signs. We expect our private life to remain private.

Further Affiant saith naught.

DONE AND DATED THIS 26th day of August, 1995.

/s/
Paul W. Berger

SUBSCRIBED AND SWORN to before me this 26th day of August, 1995.

/s/
Notary Public for the State of Montana
Residing at Jordan, MT
My Commission Expires 4/24/96

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

PAUL W. BERGER and ERMA R. BERGER,	) Case No. CV 95-46-BLG-JDS
Plaintiffs,	) PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS'
vs.	) STATEMENT OF UNCONTROVERTED
RODNEY C. HANLON, JOEL SCRAFFORD, RICHARD C. BRANZELL, ROBERT PRIEKSAT, KRIS A. McLEAN TURNER BROAD-CASTING SYSTEMS, INC., a Georgia corporation, ROBERT RAINEY, and DONALD HOOPER,	) FACTS, STATEMENT OF GENUINE ISSUES AND ADDITIONAL UNCONTROVERTED FACTS IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
Defendants.	) [Fed. R. Civ. P. 56 and Rule 220-4(a)]

I.

PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' STATEMENT OF UNCONTROVERTED FACTS

Plaintiffs Paul W. Berger and Erma R. Berger ("Bergers") hereby respond to the Federal Defendants' Statement of Uncontroverted Facts. Pursuant to Rule 220-4(a), the Bergers also submit their Statement of Genuine Issues and Additional Uncontroverted Facts, in support of their opposition to the Federal Defendants' Motion to Dismiss or in the Alternative Summary Judgment.

Furthermore, the Bergers object on the ground they have not had an opportunity to conduct adequate discovery and, thus, the Federal Defendants' alternative motion for summary judgment is premature. Fed. R. Civ. P. 56(f); Affidavit of Jay F. Lansing ("Lansing Aff."), ¶¶ 14-16.

Federal Defendant's Alleged Uncontroverted Facts	Plaintiffs' Responses
1. On March 24, 1995, Special Agents of the Fish and Wildlife Service ("FWS") investigating illegal predator poisonings executed a valid federal search warrant on the ranch owned by plaintiffs Paul and Erma R. Burger. Hanlon Decl. ¶3.	1. Without waiving any objections, plaintiffs admit that on March 24, 1993, FWS Special Agents executed a federal search warrant on the Berger Ranch. However, plaintiffs object to the allegedly undisputed nature of the circumstances surrounding the execution of the search warrant involving CNN.

Federal Defendant's Alleged Uncontroverted Facts	Plaintiffs' Responses
2. Cable News Network ("CNN") correspondent Jack Hamann and a CNN camera crew requested and received permission to accompany the FWS agents during the execution of the search warrant. See, e.g., First Amended Complaint. ¶34.	2. Without waiving any objections, plaintiffs admit that CNN correspondent Hamann and the CNN camera crew, pursuant to an agreement with the Government, accompanied FWS agents onto the Berger ranch during the execution of the warrant. However, plaintiffs object and dispute that the agreement was lawful, and dispute the circumstances surrounding the execution of the warrants on the Berger ranch. See Plaintiffs' Statement of Genuine Issues and Additional Uncontroverted Facts ("PS"), infra; Lansing Aff., Exh. 7 (Scrafford [transcript] at [page] 37).

Federal Defendant's Alleged Uncontroverted Facts	Plaintiffs' Responses
3. Special Agents Scrafford and Branzell requested permission to enter the residence in order to explain to Mrs. Berger the agents' purpose at the ranch. Scrafford Testimony. TR. at 102 (Federal Defendants' Request for Judicial Notice, Exh. B).	3. Without waiving any objections, plaintiffs admit that defendant Special Agent Scrafford testified in United States v. Berger, but object and dispute the undisputed nature of the testimony that was given. Defendant Special Agent Scrafford did not testify to this statement at page 102 of the transcript. Agent Scrafford instead testified that he did not request permission. Lansing Aff. Exh. 7. (Scrafford at 115-116). See PS, infra. It is also undisputed that any such "permission," if given, was involuntary.
4. The agents did not search for any evidence of illegal predator poisonings (the subject of the investigation) in the residence. Scrafford Testimony, Tr. at 108 (Federal Defendants' Request for Judicial Notice, Exh. B).	4. Without waiving any objections, plaintiffs admit that defendant Special Agent Scrafford testified in United States v. Berger. However, plaintiffs object and dispute that defendant Scrafford's testimony is undisputed and that entry into the Bergers residence was justifiable. See PS, infra.

Federal Defendant's Alleged Uncontroverted Facts	Plaintiffs' Responses
5. The agents did not insist that the Bergers remain on the ranch during the execution of the warrant. Scrafford Testimony. Tr. at 103 (Federal Defendants' Request for Judicial Notice, Exh. B).	5. Without waiving any objections, plaintiffs admit that defendant Special Agent Scrafford testified in United States v. Berger. However, plaintiffs object and dispute that defendant Scrafford's testimony is undisputed. See PS, infra.

II.

PLAINTIFFS' STATEMENT OF GENUINE ISSUES

Pursuant to Rule 220-4(a), of the Revised Rules of Procedure for the United States District Court for the District of Montana, the Bergers hereby submit the following genuine issues:

Genuine Statement	Evidence
1. Assistant United States Attorney Kris A. McLean ("AUSA McLean") was not authorized to serve or execute the search warrant at the Berger Ranch.	Lansing Aff., Exhibit ("Exh.") 7, (Hanlon at 27-30); see Fed. R. Civ. P. 41(c), (h) and 54(c); 18 U.S.C. §§3105, 2234.
2. AUSA McLean was not necessary to the execution of the search warrant at the Berger Ranch.	Id.; Lansing Aff., Exh. 5 (DOJ Manual, 1-7.000 Media Relations (1993-2 Supp.); 28 C.F.R. §50.2(b)); see also, DOJ Manual, 1-7.0001 (1990-1 Supp.); 5 U.S.C. §§552a (b)(1), (11), (i)(1).

Genuine Statement	Evidence
3. AUSA McLean was not authorized to execute an agreement with CNN allowing CNN to accompany Federal law enforcement agents during the execution of a search warrant.	Id.
4. CNN was not authorized to attend and participate, or videotape and record the pre-search briefing on March 23, 1993.	Id.
5. The agreement executed by AUSA McLean and CNN correspondent Jack Hamann ("Hamann"), did not confer legal authority on CNN to be at the Berger Ranch on March 24, 1993.	Id.
6. The agreement did not confer legal authority on CNN to videotape and record the execution of the search warrant at the Berger Ranch on March 24, 1993.	Id.
7. The Bergers were not asked to give permission or consent to CNN to be on the Berger Ranch on March 24, 1993.	Affidavit of Paul W. Berger ("Berger Aff."), ¶¶5, 6, 8, 10-13.

Genuine Statement	Evidence
8. The Bergers were not asked to give permission or consent to being videotaped or recorded by CNN on March 24, 1993.	Id.
9. The Bergers were not asked to give permission or consent to CNN to publish or distribute any videotape or audio outtakes made on the Berger Ranch on March 24, 1993.	Id.
10. The Bergers were not asked to give permission or consent to Federal defendants Branzell and Scrafford to enter the residence on March 24, 1993.	Lansing Aff., Exh. 7, (Scrafford at 115-116); Berger Aff., ¶6; see 18 U.S.C. §§2234, 2236, 3109.
11. The Bergers were not advised that the search warrant specifically excluded the residence.	Lansing Aff., Exh. 3; Berger Aff., ¶7; see 18 U.S.C. §§2234, 2236, 3109.
12. The Bergers were not advised that they were free to leave the ranch during the execution of the search warrant on March 24, 1993.	Berger Aff., ¶15.

Genuine Statement	Evidence
13. The Bergers did not feel free to leave the ranch during the execution of the search warrant on March 24, 1993.	Berger Aff., ¶15.
14. The Federal defendants disclosed confidential information about the Bergers at the pre-search briefing on March 23, 1993 and during the execution of the warrants on March 24, 1993.	Lansing Aff., Exh. 8 (September 9, 1993 CNN Environment Unit transcript ("CNN Transcript") of audio and videotape of March 23, 1993 pre-search briefing and March 24, 1993 execution of search warrant at Berger Ranch entitled "Ring of Death"), [citing] tape 01 at [pages] 3 to tape 05 at 8; Lansing Aff., Exh. 5 (DOJ Manual, 1-7.000 Media Relations (1993-2 Supp.); 28 C.F.R. §50.2(b)); see also, DOJ Manual, 1-7.0001 (1990-1 Supp.); 5 U.S.C. §§552a (b)(1), (11), (i)(1); 18 U.S.C. §§3105, 2234, 2236, 3109.

Genuine Statement	Evidence
15. The Federal defendants, including AUSA McLean, were not authorized to give on-camera or audio recorded interviews with CNN at any time.	Lansing Aff., Exh. 5, (DOJ Manual, 1-7.000 Media Relations (1993-2 Supp.); 28 C.F.R. §50.2(b)); see also, DOJ Manual, 1-7.0001 (1990-1 Supp.); 5 U.S.C. §§552a (b)(1), (11), (i)(1).
16. Special Agent Scrafford was not authorized to wear the hidden microphone for CNN.	Id.; Lansing Aff. Exh. 6; see 18 U.S.C. §§2234, 2236, 3109.
17. The Government and Federal defendants were not authorized to allow a CNN camera to be mounted on a Government vehicle.	Id.

III.

PLAINTIFFS' FURTHER STATEMENT OF UNCONTROVERTED FACTS

Plaintiffs submit the following additional undisputed facts and supporting evidence in order to provide the Court with an overview of the relevant factual circumstances which further show that defendants' alleged uncontroverted facts are in dispute and compel denial of defendants' motions. (Endnote 1)

Plaintiffs' Uncontroverted Facts	Evidence
18. A written agreement dated March 11, 1993 ("Agreement") was executed between AUSA McLean, on behalf of the United States Attorney's Office for the District of Montana ("Government"), and defendant Hamann, a correspondent for and on behalf of defendants CNN and Turner Broadcasting Systems, Inc. ("TBS"), which provided, in pertinent part that: "This confirms our agreement that the United States Attorney's Office for the District of Montana agrees to allow CNN to accompany USFWS [United States Fish & Wildlife Service] agents as they attempt to execute a criminal search near Jordan, Montana, sometime during the week of March 22, 1993. . . ." The United States Attorney's Office replaced the USFWS in an unexecuted version of the letter dated March 5, 1993.	Lansing Aff., Exh. 1; (the executed Agreement is Exhibit A to First Amended Complaint).

Plaintiffs' Uncontroverted Facts	Evidence
19. Under the Agreement, the Government allowed Hamann and a CNN camera crew (defendants Robert Rainey and Donald Hooper), on behalf of CNN and TBS (collectively "CNN" or "CNN defendants"), to accompany USFWS Special Agents including Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell") and Robert Prieksat ("Prieksat"), as well as AUSA McLean (collectively "Federal defendants"), and other Federal and State law enforcement agents, onto the Berger Ranch on March 24, 1993, to videotape and record the execution of search and seizure warrants.	Lansing Aff., Exh. 1.

Plaintiffs' Uncontroverted Facts	Evidence
20. The Agreement was executed before the Berger Search Warrant was issued. In early 1993, USFWS officials were contacted by CNN representatives about filming the execution of a search warrant to obtain "sound bites" for a story on the alleged poisoning of endangered species. CNN defendant Hamann was referred to Federal defendant Hanlon and AUSA McLean, who did not object to CNN's filming.	See Brief in Support of the Federal Defendants' Motion to Dismiss or in the Alternative for Summary Judgment ("D.Brief") at 2:22-3:3, citing plaintiffs' First Amended Complaint. (Endnote 2)

Plaintiffs' Uncontroverted Facts	Evidence
21. The CNN defendants wanted to obtain live action video footage of search warrant executions to broadcast on CNN and TBS environmental programs respectively entitled "Earth Matters" and Network Earth." This was outlined by defendant Hamann in a CNN/TBS Network Earth/Earth Matters memorandum entitled "Producer Package Checklist: Story Set-Up Packet" and dated March 11, 1993.	Lansing Aff., Exh. 2.

Plaintiffs' Uncontroverted Facts	Evidence
22. AUSA McLean was admittedly "motivated by the prosecutor's self-interest in getting the word out...," when he executed the Agreement to allow the CNN defendants to videotape and record the execution of the Search Warrant on the Berger Ranch -- during an on-going criminal investigation -- so that the publicity would have a deterrent effect on "...other people that might be contemplating these crimes, [or] committing these crimes right now," and to do his personal "bit" for the environment.	Lansing Aff., Exh. 8, CNN Transcript, tape 11 at 7-8; Exh. 1.
23. The CNN defendants' intended to participate in and videotape and record the execution of the search warrant on the Berger Ranch for commercial purposes and to provide the Government with the means for obtaining publicity.	Lansing Aff., Exh. 1.
24. The CNN defendants' legal department received a copy of the Agreement.	Lansing Aff., Exh. 1.

Plaintiffs' Uncontroverted Facts	Evidence
25. All of this information was deliberately concealed from United States Magistrate Judge Robert Holter and was not disclosed in defendant Hanlon's Application and Affidavit for Search Warrant, nor in the two (2) Application and Affidavit for Seizure Warrant forms, which were submitted to the Magistrate Judge on or about March 18, 1993, after the execution of the Agreement.	Lansing Aff., Exh. 3 and 4.
26. The Search Warrant and two (2) Seizure Warrants were issued by the Magistrate Judge on or about March 18, 1993, specifically to defendant Hanlon in his official capacity.	Lansing Aff., Exh. 3 and 4; see also Declaration of Rodney C. Hanlon ("Hanlon Decl.") in support of Federal Defendants' Motion to Dismiss or in the Alternative Summary Judgment, ¶4.

Plaintiffs' Uncontroverted Facts	Evidence
27. The CNN defendants were not specified in the Application and Affidavit for Search Warrant submitted by defendant Hanlon to the Magistrate Judge because they were not necessary to assist in the execution of the Search Warrant.	Lansing Aff., Exh. 3.
28. The Berger residence was specifically excluded from search under the Search Warrant.	Lansing Aff., Exh. 3; Berger Aff., ¶18.
29. The CNN defendants were permitted to attend, participate in, and videotape and record the pre-search briefing which took place on or about March 23, 1993. It was conducted by defendant Hanlon, the FWS Special Agent assigned as the case coordinator by his supervisor, defendant Scrafford.	Lansing Aff., Exh, 8, CNN Transcript, tape 05 at 6-7; Hanlon Decl., ¶3.

Plaintiffs' Uncontroverted Facts	Evidence
30. CNN's attendance and participation in the pre-search briefing was permitted by the Federal defendants in charge of the various aspects of the criminal investigation against Mr. Berger, namely, AUSA McLean as well as FWS Special Agents Hanlon and Scrafford.	Lansing Aff., Exhs. 1 and 2; Exh. 8, CNN Transcript.
31. All of the Federal defendants and other law enforcement agents in attendance were aware of and knew that CNN was present and participating in the pre-search briefing.	Lansing Aff., Exh. 8, CNN Transcript of tapes 01-05.

Plaintiffs' Uncontroverted Facts	Evidence
32. During the pre-search briefing, AUSA McLean and the other Federal defendants disclosed to the CNN defendants, orally and in writing, confidential information about the Bergers and the pending criminal investigation against Mr. Berger, as well as details about the execution of the search warrant scheduled for the next morning; all of this was videotaped and recorded by the CNN defendants.	Lansing Aff., Exh. 8, CNN Transcript, tape 01 at 3-4, tape 03 at 1-5, and tape 04 at 1-6.
33. The Agreement executed by AUSA McLean, and CNN's participation in the pre-search briefing violates Federal statutes and Department of Justice policies limiting Federal prosecutor relations with and prohibits the release of information to the media about on-going criminal investigations.	Lansing Aff., Exh. 5, (DOJ Manual, 1-7.000 Medial Relations (1993-2 Supp.); 28 C.F.R. §50.2(b)) see also, DOJ Manual, 1-7.0001 (1990-1 Supp.); 5 U.S.C. §§552a (b)(1), (11), (i)(1); 18 U.S.C. §§3105, 2234.

Plaintiffs' Uncontroverted Facts	Evidence
34. On the morning of March 24, 1993, the Federal defendants proceeded toward the Berger Ranch in a caravan of Government vehicles. The Federal defendants were accompanied by the CNN defendants in the Government vehicles. The travelling caravan was videotaped by one of the CNN defendants from the interior of one of the Government vehicles, and another CNN camera was mounted to the exterior of a Government vehicle driven by defendant Scrafford (which was later driven by defendant Branzell).	Lansing Aff., Exh. 8, CNN Transcript, tape 06 at 2-tape 07 at 2.
35. Mr. Berger drove down the county road leading away from the Ranch and met with the throng of Federal defendants in the vehicle convoy heading toward his Ranch.	Lansing Aff., Exh. 8, CNN Transcript, tape 06 at 2-tape 07 at 2; Berger Aff., ¶2.

Plaintiffs' Uncontroverted Facts	Evidence
36. Upon meeting the Government caravan on the county road, Mr. Berger pulled over and was approached by several Federal defendants, including defendants Scrafford, Branzell and Prieksat. Mr. Berger was advised by defendant Scrafford that a Search Warrant was about to be executed at his Ranch. However, Mr. Berger was told by defendant Scrafford that the Court ordered the Federal defendants to search every building on the ranch; he was not told that the residence was specifically excluded from search.	Lansing Aff., Exh. 8, CNN Transcript, tape 07 at 6; Berger Aff., ¶¶4 and 7.
37. Mr. Berger was not advised that defendant Scrafford was wearing a hidden microphone that allowed the CNN defendants to monitor and record everything that he was saying.	Lansing Aff., Exh. 8, CNN Transcript, tape 07 at 1-16; Berger Aff. ¶5; D.Brief at 3:9-10.

Plaintiffs' Uncontroverted Facts	Evidence
38. Mr. Berger was not advised about the presence of the CNN defendants and was not advised that they were already videotaping and recording him.	Lansing Aff., Exh. 8, CNN Transcript, tape 07 at 1-16; Berger Aff., ¶10.
39. Mr. Berger was interrogated by defendants Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons to bait carcasses, illegal coyote getters, and killing eagles. This interrogation was videotaped and recorded by the CNN defendants.	Lansing Aff., Exh. 8, CNN Transcript, tape 07 at 1-16; Berger Aff., ¶14; see 18 U.S.C. §§2234, 2236.
40. Mr. Berger was never advised of any of his rights, such as the right to remain silent.	Lansing Aff., Exh. 8, CNN Transcripts (entire); Berger Aff., ¶9.

Plaintiffs' Uncontroverted Facts	Evidence
41. Federal defendant Scrafford requested and was allowed to accompany Mr. Berger in his truck back to the Ranch under pretext that Scrafford should explain the situation to Mrs. Berger. While driving back to the Ranch, Mr. Berger was not advised that everything he said was being monitored and recorded by the CNN defendants through the hidden CNN microphone worn by defendant Scrafford.	Lansing Aff., Exh., CNN Transcript, tape 07 at 1-16; Berger Aff., ¶5.
42. Mr. Berger never consented to being recorded and videotaped on the county road.	Berger Aff., ¶¶5, 18.
43. Defendant Scrafford and the Federal defendants deliberately concealed the fact that he was wearing a hidden CNN microphone. They also deliberately concealed the presence of the CNN defendants and the fact that CNN was videotaping and recording everything, including Mr. Berger.	Lansing Aff., Exh. 8 CNN Transcript, tape 07 at 1-16; Berger Aff., ¶¶5, 6, 8 and 10-13.

Plaintiffs' Uncontroverted Facts	Evidence
44. CNN wired defendant Scrafford with a hidden microphone and mounted a CNN camera onto a Government vehicle.	Lansing Aff., Exh. 1 and 2; Exh. 8, CNN Transcript (entire).
45. Upon entering the Berger Ranch on the morning of March 24, 1993, Federal defendants Scrafford and Branzell followed Mr. Berger into the residence without obtaining permission of either Mr. Berger or Mrs. Berger.	Lansing Aff., Exh. 7 (Scrafford at 115-116); Exh. 8, CNN Transcript, tape 07 at 15-16; Berger Aff. ¶¶6, 18.
46. The Bergers were not advised that their residence was specifically excluded from search.	Lansing Aff., Exh. 3; Exh. 8, CNN Transcript, tape 07 at 6; Berger Aff., ¶7.
47. The CNN defendants freely accompanied the Federal defendants (and other Federal and State agents) during the March 24, 1993 execution of the search warrant on the Berger Ranch.	D.Brief at 3:7-8; Lansing Aff., Exh. 7 (Scrafford at 37).

Plaintiffs' Uncontroverted Facts	Evidence
48. The Bergers were not advised that everything they said was being monitored and recorded by the CNN defendants through the hidden CNN microphone worn by Federal defendant Scrafford.	Lansing Aff., Exh. 8, CNN Transcript, tape 07 at 15-16; Berger Aff., ¶¶5, 6, 8, 10-13, and 18.
49. The Bergers cooperated fully.	Berger Aff., ¶¶5-17.
50. The Bergers were not advised that the CNN defendants had entered the Ranch and were videotaping and recording the execution of the warrants by the Federal defendants and other law enforcement agents on their property.	Lansing Aff., Exh. 8, CNN Transcript (entire); Berger Aff., ¶¶5, 6, 8, 10-13 and 18.

Plaintiffs' Uncontroverted Facts	Evidence
51. Mr. Berger is 74 years old and in poor health, having spent the previous five months in and out of the hospital. He was on oxygen and medication at the time of the execution of the Search Warrant. Mr. Berger was visibly upset. Mrs. Berger, who is 84 years old, is also in poor health and had just been released from the hospital a week before the Search Warrant was executed at the Ranch.	Berger Aff., ¶17.
52. The CNN defendants were allowed to participate in and videotape and record the execution of the warrants at the Berger Ranch by the Federal defendants in charge of various aspects of the criminal investigation, including AUSA McLean, and FWS Special Agents Scrafford and Hanlon.	Lansing Aff., Exhs. 1 - 2; Exh. 8, CNN Transcript, tape 10 at 3-11.

Plaintiffs' Uncontroverted Facts	Evidence
53. The Federal defendants had no authority to allow CNN to enter the Berger Ranch with them to videotape and record the execution of the Search Warrant.	Lansing Aff., Exh. 3 and 4; see 5 U.S.C. §552a, 18 U.S.C. §§3105, 3109.
54. The CNN defendants freely followed and videotaped and recorded the Federal defendants and agents engaged in the execution of the warrants, as well as Hamann's interviews with the Federal defendants, in which he asked generally about rogue ranchers who illegally killed eagles and specifically solicited incriminating comments about Mr. Berger.	Lansing Aff. Exh. 8, CNN Transcript, tape 07-tape 22.
55. Mr. Berger and Mrs. Berger did not consent to the presence of CNN on their Ranch on March 24, 1993.	Berger Aff., ¶¶5, 8, 10-13 and 18.

Plaintiffs' Uncontroverted Facts	Evidence
56. The Bergers believed that the CNN defendants were law enforcement agents. They were indistinguishable from the Federal defendants because they all wore work, or "street" clothes (some of the agents donned yellow protective outer wear); the CNN defendants did not bear any identification designating themselves as members of CNN or the media. AUSA McLean also appeared to be a Federal Law enforcement agent. He wore a jacket with "Federal Agent" on the back and an "ATF" (Alcohol, Tobacco and Firearms) cap.	Lansing Aff., Exh. 8, CNN Transcript, tape 06 at 3; Berger Aff., ¶¶11 and 12.
57. All of the federal defendants were armed with weapons.	Lansing Aff., Exh. 7, (Scrafford at 112).

Plaintiffs' Uncontroverted Facts	Evidence
58. The Government and CNN worked in concert to conceal from the Bergers, the CNN's identify, the fact that Scrafford wore the hidden CNN microphone, and that CNN was videotaping and recording the execution of the Search Warrant. By way of example, Mr. Berger discovered the videocamera and protested about being filmed while agents were searching inside a shed on the Berger Ranch. To avoid a confrontation, Hamann deftly directed the camera to film the contaminants team and Federal defendants Branzell and Scrafford diverted Mr. Berger's attention by bombarding him with leading questions about using poisons and shooting eagles.	Lansing Aff., Exh. 8, CNN Transcript, tape 08 at 13; Berger Aff., ¶¶5 and 10.

Plaintiffs' Uncontroverted Facts	Evidence
59. At no time were either of the Bergers advised that they were free to leave the Ranch during the execution of the search warrant. Mr. Berger was told that he would have to be in the company of an agent during the entire time of the execution of the search warrant.	Lansing Aff., Exh. 8, CNN Transcript, tape 07 at 25; Berger Aff., ¶¶15 and 18.
60. Mrs. "Rosie" Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense.	Lansing Aff., ¶8.
61. At no time during the execution of the search warrant were either of the Bergers advised of any rights including the right against self-incrimination.	Lansing Aff., Exh. 8, CNN Transcript (entire); Berger Aff., ¶9.

Plaintiffs' Uncontroverted Facts	Evidence
62. The Federal defendants caused the execution of the Berger Search Warrant (and pre-search briefing) to be videotaped and recorded by the CNN defendants to facilitate the publication of all or part of the video and audio footage ("outtakes") for broadcast on the CNN and TBS programs entitled "Earth Matters" and "Network Earth."	Lansing Aff., Exhs. 1 and 2.
63. Video and audio outtakes of the execution of the Berger Search Warrant were incorporated into a program segment entitled "Ring of Death" which included Mr. Berger's secretly recorded conversations, interiors of buildings and various outdoor location on the Berger Ranch, and scenes of the agents searching and seizing "evidence."	Lansing Aff., ¶8. Exh. 9.

Plaintiffs' Uncontroverted Facts	Evidence
64. AUSA McLean was one of several Federal defendants interviewed by defendant Hamann previously and for the CNN camera during the execution of the search warrant during which he made personal and disparaging remarks about Mr. Berger.	Lansing Aff., Exh. 5, (DOJ Manual, 1-7.000 Media Relations (1993-2 Supp.); 28 C.F.R. §50.2(b)); see also, DOJ Manual, 1-70001 (1990-1 Supp.); 5 U.S.C. §§552a (b)(1), (11), (i)(1); Exh. 8, CNN Transcript tape 11 at 2-8.
65. No formal charges had yet been brought against Mr. Berger when the search warrant was executed and videotaped and recorded on March 24, 1993.	Lansing Aff., Exh. 3 and 4.
66. Despite Mr. Berger's acquittal on all charges of killing eagles, defendant Hamann introduced the segment by implying that Mr. Berger had killed hundreds of federally-protected eagles.	Lansing Aff., Exh. 8, CNN transcript, tape 12 at 1-3.

Plaintiffs' Uncontroverted Facts	Evidence
67. A few days prior to Mr. Berger's sentencing on October 30, 1993, Federal defendant Hanlon sent a letter on USFWS stationary, to "All participants in the Paul Berger (INV.4506A0) eagle poisoning investigations," to announce the broadcast schedule of the segment on CNN and TBS. Hanlon's message also noted that "the Paul Bergers and non-believers of the world would have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD . . . Japan, Chile, France and every place in between."	Lansing Aff., Exh. 10.
68. The segment was broadcast by TBS on October 17, 1993, just three days before Mr. Berger's sentencing.	Lansing Aff., Exh. 9.

Plaintiffs' Uncontroverted Facts	Evidence
69. The segment aired nationally and internationally at least ten (10) times between October 1993 and April 1994, over CNN and TBS, as well as CNN1 and TNT Latin America.	Lansing Aff., Exh. 9.
70. Had the Bergers known that the CNN defendants were members of the media and not law enforcement agents authorized to execute the Search Warrant, they would not have allowed the CNN defendants to remain on the Berger Ranch during the execution of the Search Warrant on March 24, 1993.	Berger Aff., ¶¶13 and 18.
71. Neither Mr. Berger nor Mrs. Berger ever consented to the use, sale or distribution of any portion of any videotape or audio recording made during the execution of the Search Warrant on the Berger Ranch on March 24, 1993.	Berger Aff., ¶¶13 and 18.

DATED: August 29, 1995

RESPECTFULLY SUBMITTED,

MOSES LAW FIRM

By _____/s/_____
Jay F. Lansing

ROSSBACHER & ASSOCIATES

Attorneys for Plaintiffs
Paul W. Berger and Erma R. Berger

[CERTIFICATE OF MAILING OMITTED IN PRINTING]

1. The facts referred to herein and in plaintiffs' opposition brief are established by the following evidentiary sources: defendants' admissions; transcript of the criminal proceedings in United States v. Berger; transcripts of the CNN videotapes, both broadcasted and non-broadcasted; Affidavit of Paul W. Berger; Affidavit of Jay F. Lansing and exhibits. The videotapes created by CNN are available for the Court's inspection In Camera if the Court wishes to conduct such an inspection.

2. For summary judgment, statements which are deemed admissions "have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact [citations omitted]." See American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226-227 (9th Cir. 1988) (evidentiary admissions, or statements of fact contained in a brief, may be considered the admissions of a party at the discretion of the district court, while factual assertions in pleadings are judicial admissions conclusively binding on the party who made them.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA

[Exhibit Two to Affidavit of Jay Lansing]

Network Earth — Earth Matters

Producer Package Checklist:
Story Set-Up Packet

March 11, 1993 — Jack Hamann

Story Slug	**Coyote Killers**
Correspondent	**Jack Hamann**
Associate Producer	**Susan Olson**
Photographer	**Rob Rainey**
Tech	**Don Hooper**
Editor	
Shooting Dates	**March 22-28, 1992 [sic]**
Air Date	**late Spring/early Summer**

Story Synopsis

We are planning a 12-14 minute story, running on both sides of the first commercial break. Part One focuses on law enforcement. Part Two on the reluctant judicial system.

Overview:
Coyotes are one of the most enduring symbols of the American West . . . a mournful howl on a moonlit night across a vast expanse of prairie, plain or foothills. But coyotes are also the

enduring bane of the American sheep rancher . . . blamed for millions of dollars of lost lambs every Spring. Despite a hundred-year war, the coyote has not surrendered, and the killing continues to this day. Most coyotes are shot with rifles, or sprayed with small lethal bursts of cyanide hidden in buried canisters. But some sheep ranchers use a far more insidious weapon: deadly poisons. Rogue ranchers, in clear violation of state and federal laws, lace the carcasses of dead animals (sheep, calves, etc.) with potent pesticides, and leave them scattered around the public and private rangeland where their sheep graze. Coyotes suffer painful and violent deaths, but it doesn't stop there. Ravens and vultures and -- especially -- eagles . . . all eat the poisoned carcasses, too. US Fish & Wildlife agents call the sordid crime scenes "the Circle of Death."

Part One: Law Enforcement

We have exclusive access to what promises to be a major coyote, eagle poisoning case. The day before the raid, we'll meet with a team of state and federal agents and tape their briefing. Then we'll get up long before dawn and head for one of the most remote ranches in North America. As the sun breaks over the horizon, the agents, armed with federal search warrants, will swoop in looking for what is supposed to be a huge cache of illegal poisons. Agents will split into teams and look for carcasses left the night before. We'll try to follow the group that finds the dumping ground . . . the rancher's

graveyard of eagles and coyotes and other dead animals. The investigation will continue throughout the day, on both public and private lands, as the officers use airplane surveillance (we'll try to be on board for some of this) to spot dead eagles and coyotes anywhere they can. The evidence will be shipped to the USFWS forensics lab in Ashland, Oregon (Ken Goddard), and the results will end up in front of a federal grand jury.

Part Two: Reluctant Judges

Ours will not be the first raid on a sheep ranch in this area. Over the past few years, agents have tried time and again to put the fear of God into these rogue ranchers. But most of the time, the ranchers get off with barely a hand slap ... paying an average of just a few dollars per coyote or eagle killed. We'll present statistics that show that judges in this region have been reluctant to upset "the way of life" of the sheep ranching community, described by many of our sources as something out of the 19th Century. We'll talk to a woman who will vividly describe how her expensive sheep dogs died violent deaths after eating poisoned carcasses, and how she was run out of town by sheep ranchers when she threatened to complain. We'll here from a sheep rancher who was himself prosecuted, only to be let off easily, and now acts as a prime critic of efforts to crack down on the use of poisons. We'll also talk with sheep ranchers who don't use poisons, who will let our viewers know that they should

insist on poison-free wool and mutton as a way of helping the sheep industry chase out the bad apples. If possible, Part Two will include interviews with federal prosecutors (a certainty) and a federal judge (could be tough on this particular shoot) who will react to the statistics that seem to show that killing coyotes and eagles are only a rather modest cost of doing business.

Supreme Court of the United States

No. 97-1927

RODNEY C. HANLON, ET AL.

v.

PAUL W. BERGER ET UX.

No. 98-83

CHARLES H. WILSON, ET UX., ET AL.

v.

HARRY LAYNE, ETC., ET AL.

ORDER ALLOWING CERTIORARI.
Filed November 9, 1998.

The petitions for writs of certiorari are granted limited to the following questions: 1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant? 2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity? The cases are consolidated and a total of one hour is allotted for oral argument.

November 9, 1998

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOE SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONERS

RICHARD A. CORDRAY
Counsel of Record
ANDREW B. CLUBOK
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, petitioners are nonetheless entitled to a defense of qualified immunity?

PARTIES TO THE PROCEEDING

The petitioners in this case are all federal employees who have been sued in their individual capacity. Petitioners Rodney Hanlon, Joel Scrafford, Richard C. Branzell, and Rodney Prieksat are special agents of the United States Fish and Wildlife Service in the Department of the Interior. Petitioner Kris A. McLean is an Assistant United States Attorney for the District of Montana. Petitioners are defendants in this case and were appellees in the court below. Petitioners are all individuals, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Paul W. Berger and his wife Erma R. Berger are the plaintiffs in this case and were the appellants in the court below.

The United States of America is also a defendant in this case, having been substituted as a party for purposes of the claim of trespass asserted originally against Kris McLean, but is not a party to the case before this Court.

Also named as defendants in this case were Turner Broadcasting Systems, Inc. ("TBS"), the parent company of Cable News Network, Inc. ("CNN"), and two CNN employees, Robert Rainey and Donald Hooper. A separate lawsuit was filed by respondents against CNN itself and against Jack Hamann, another of its employees. Those cases were treated together for purposes of the appeal, and all of these defendants were appellees in the court below. The Supreme Court Clerk's office has indicated that all of these individuals and entities are parties to the case before this Court, and are to be denoted as "respondents in support of petitioners."

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. The Fish and Wildlife Service Investigation 3

B. The Execution of the Search Warrant 5

C. The District Court Proceedings 6

D. The Decision by the Court of Appeals 8

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM AND TO OBSERVE AND RECORD THEIR EXECUTION OF A WARRANT 11

A. The Warrant Was Valid and Was Issued by a Court upon a Showing of Probable Cause 11

TABLE OF CONTENTS
(continued)

PAGE

B. The Officers Properly Executed the Warrant to Search the Ranch for Evidence of Crimes 13

C. The Members of the News Media Did Not Actively Participate in Executing the Warrant and Did Not Conduct Any Search or Seizure 14

D. The Fourth Amendment Permits Officers Who Are Executing a Warrant to Allow Third Parties to Accompany Them to Aid in Discharging Their Law Enforcement Mission 18

E. The Common Practice of Allowing News Media to Accompany Officers and to Observe and Record Their Conduct Is Reasonable and Helps to Facilitate Effective Law Enforcement 22

F. In This Case, It Was Reasonable for Petitioners to Allow Members of the News Media to Accompany Them and Observe and Record Them Executing the Search Warrant 26

G. Any Improper Intrusion or Disclosure by Officers or Others Can Be Redressed Under the Common Law Without Creating an Additional Basis for Suppressing Evidence 29

TABLE OF CONTENTS
(continued)

PAGE

II. IF THE COURT HOLDS HERE FOR THE FIRST TIME THAT SUCH CONDUCT VIOLATES THE FOURTH AMENDMENT, PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME THEY ACTED ... 32

A. Officials Are Shielded from Personal Liability by the Defense of Qualified Immunity Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law 33

B. At the Time Petitioners Acted, Courts Uniformly Held that the Constitution Allows Officers to Permit News Media to Accompany Them to Observe and Record Their Execution of a Warrant, and Justice Department Policy Endorsed the Practice 36

C. At the Time Petitioners Acted, No Court Had Ever Held that Their Conduct Violated the Fourth Amendment and Hence They Are Entitled to Qualified Immunity 40

D. It Has Long Been Common Practice to Allow News Media to Accompany and Observe Officers' Law Enforcement Activities 42

E. Relevant Decisions and the Debate in this Case Show that It Is Not Apparent, Even Now, that Petitioners Violated the Fourth Amendment 44

CONCLUSION 48

TABLE OF CONTENTS
(continued)

PAGE

APPENDIX:

U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII (Assisting the News Media) (as amended Jan.14, 1993, and as amended May 3, 1993) A1

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*
Anderson v. WROC-TV, 441 N.Y.2d 220 (Ct. App. 1981) 22, 30, 43
Arizona v. Hicks, 480 U.S. 321 (1987) 16, 17
Associated Press v. NLRB, 301 U.S. 103 (1937) 26
Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984) ... 36
Aversa v. United States, 94 F.3d 1200 (1st Cir. 1996) 23
Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995) 40
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995) ..... *passim*
Baker v. Howard, 419 F.2d 376 (9th Cir. 1969) 32
Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) 46, 47
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) ..... *passim*
Branzburg v. Hayes, 408 U.S. 665 (1972) 26
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 25
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) ... 15, 22
Butz v. Economou, 438 U.S. 478 (1978) 33
Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) 39
Commonwealth v. Farrar, 413 A.2d 1094 (Pa. Super. 1979) 19
Commonwealth v. Sbordone, 678 N.E.2d 1184 (Mass. 1997) 21
Crawford-El v. Britton, 118 S. Ct. 1584 (1998) 27, 33
Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989) 20
Dalia v. United States, 441 U.S. 238 (1979) 18, 19
Davis v. Scherer, 468 U.S. 183 (1984) 33, 34, 47
Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) ... 31
Elder v. Holloway, 510 U.S. 510 (1994) 34

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977) 23, 42, 43
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 33
Hagler v. Philadelphia Newspapers, Inc., 1996 WL 408605, Civ. No. 96-2154 (E.D. Pa. July 12, 1996) .. 46
Harlow v. Fitzgerald, 457 U.S. 800 (1982) ..... *passim*
Higbee v. Times-Advocate, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) ..... *passim*
Hunter v. Bryant, 502 U.S. 224 (1991) (per curiam) 42
Katz v. United States, 389 U.S. 347 (1967) 21
Kelley v. State, 315 S.E.2d 916 (Ga. App. 1984) 20, 28
Lopez v. United States, 373 U.S. 427 (1963) 15, 17, 27
Magenis v. Fisher Broadcasting, Inc., 798 P.2d 1106 (Or. App. 1990) 22, 31
Malley v. Briggs, 475 U.S. 335 (1986) ..... *passim*
Michigan v. Summers, 452 U.S. 692 (1981) 18, 21, 26
Miller v. NBC, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986) 22, 30
Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*
Moncrief v. Hanton, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) ..... *passim*
Ohio v. Robinette, 117 S. Ct. 417 (1996) 24, 28
On Lee v. United States, 343 U.S. 747 (1952) 15
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997) 8, 41, 45
Paul v. Davis, 424 U.S. 693 (1976) 39
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 18
People v. Boyd, 474 N.Y.S.2d 661 (Sup. Ct. 1984) 24
People v. Superior Ct., 598 P.2d 877 (Cal. 1979) 19
People v. Turner, 57 Cal. Rptr. 854 (Ct. App. 1967) 20

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Prahl v. Brosamle, 295 N.W.2d 768 (Wis. App. 1980) ..... *passim*
Procunier v. Navarette, 434 U.S. 555 (1978) ..... *passim*
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 25
Rogers v. Buckel, 615 N.E.2d 669 (Ohio App. 1992) 22, 31
Scheuer v. Rhodes, 416 U.S. 232 (1974) 47
Scott v. State, 559 So. 2d 269 (Fla. App. 1990) 22, 38
Scott v. United States, 436 U.S. 128 (1978) 27
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996) 21
State v. Klosterman, 317 N.W.2d 796 (N.D. 1982) 19
State v. Wade, 544 So. 2d 1028 (Fla. App. 1989) 19
Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) ... 39
Taylor v. KTVB, Inc., 525 P.2d 984 (Idaho 1974) 25
Texas v. Brown, 460 U.S. 730 (1983) 16
The Florida Star v. B.J.F., 491 U.S. 524 (1989) 32
United States v. Caceres, 440 U.S. 741 (1979) 15
United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) (per curiam) 15, 20
United States v. Dellinger, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972) 40
United States v. Hubbard, 493 F. Supp. 209 (D.D.C. 1979) 24
United States v. Jacobsen, 466 U.S. 109 (1984) .. 16, 17, 21
United States v. Karo, 468 U.S. 705 (1984) 17
United States v. Lanier, 117 S. Ct. 1219 (1997) 47
United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988) . 22
United States v. Nicholson, 17 F.3d 1294 (10th Cir. 1994) 28

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

United States v. O'Neal, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972) 40
United States v. Ramirez, 118 S. Ct. 992 (1998) 18, 29
United States v. United States Dist. Ct., 407 U.S. 297 (1972) 40
United States v. White, 401 U.S. 745 (1971) ..... *passim*
United States v. Wright, 667 F.2d 793 (9th Cir. 1982) ... 15
United States Dept. of Defense v. FLRA, 510 U.S. 487 (1994) 24
Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981) 39
Weeks v. United States, 232 U.S. 383 (1914) 16
Wilson v. Layne, 110 F.3d 1071 (4th Cir. 1997), *aff'd*, 141 F.3d 111 (1998) (en banc), *cert. granted*, No. 98-83 ..... *passim*
York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) 32

Constitutional Provisions, Statutes, Rules, Policies

U.S. CONST. amend. IV ..... *passim*
7 U.S.C. § 136j(a)(2)(G) 5
18 U.S.C. § 3105 ..... 13, 17
28 U.S.C. § 1254(1) 3
28 U.S.C. § 2679(d)(1) 30
Fed. R. Crim P. 41 ..... 12, 28
U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII (Assisting the News-Media) (as amended Jan.14, 1993) ... *passim*

TABLE OF AUTHORITIES
(continued)

PAGE

Other Authorities

MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW (5th ed. 1995) 44
RESTATEMENT (SECOND) OF TORTS § 652 ..... 25, 30, 31
Richard Zoglin, *Live on the Vice Beat*, TIME, Dec. 22, 1986, at 60 42

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONERS

INTRODUCTION

The Court has granted *certiorari* in this case and in the companion case of *Wilson v. Layne*, No. 98-83, and has directed the parties to brief both the underlying Fourth Amendment issue and the qualified immunity issue.

In addressing the first of these questions, it is important for the Court to recognize that its ruling on the Fourth Amendment issue is one of first impression. As many lower court judges have observed, the proper resolution of that issue is not clear-cut, one way or the other, based on doctrine, tradition, or precedent. Petitioners in this case are entitled to invoke the

defense of qualified immunity against respondents' claims of personal liability for money damages because the contours of any such right under the Fourth Amendment -- however the Court may rule in this case *de novo* -- were not "sufficiently clear that a reasonable official would understand that what he [was] doing [in March 1993] violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, the Court should uphold qualified immunity here on the same basis as it did in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985).

At the time petitioners acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that such conduct was unlawful. Indeed, the only lower courts that had addressed the issue had upheld the lawfulness of allowing news media to accompany officers and to observe and record their execution of a warrant. In the years since, judges have repeatedly disagreed about whether this conduct violates the Fourth Amendment at all, and they have found no precedent whatsoever that had "clearly established" such a violation at the time that petitioners acted. In these circumstances, the Court should reaffirm its sound admonition that public officials are entitled to qualified immunity where they "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 129 F.3d 505 (1997), and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-26a. The District Court's opinion and order granting summary judgment for petitioners is unreported (except as *Berger v. Hanlon*, 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996)), and appears at Pet. App. 27a-47a. The Ninth Circuit's order denying a petition for rehearing and suggestion for rehearing *en banc* appears at Pet. App. 48a.

STATEMENT OF JURISDICTION

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on February 25, 1998. Pet. App. 48a. Petitioners filed a timely petition for *certiorari* on May 26, 1998. The Court granted the petition on November 9, 1998, and consolidated this case for argument with *Wilson v. Layne*, No. 98-83. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Fish and Wildlife Service Investigation.

This lawsuit stems from an investigation of respondents by the United States Fish and Wildlife Service in the Department of the Interior. The investigation occurred after federal officials received complaints and information from state wildlife officials and former employees of the Bergers, who indicated that Mr. Berger was violating federal law by using poisons to kill predators on his ranch, including eagles. Pet. App. 4a. The investigation led to criminal charges against Mr. Berger, who was convicted on one charge of using a registered pesticide (Furadan) in a manner inconsistent with its labeling, which is a federal crime. *Id.* at 7a.[1]

Petitioners in this case are four special agents of the United States Fish and Wildlife Service in the Department of the

---

[1] The facts alleged in the criminal information were that Mr. Berger laced sheep carcasses with Furadan, with the intent of killing predators, including eagles. Pet. App. 7a.

Interior and an Assistant United States Attorney who helped to plan and participated in the investigation. In the course of their investigation, they learned that Mr. Berger had allegedly poisoned or shot numerous eagles on his ranch over the years. Pet. App. 4a. In an effort to obtain evidence concerning these allegations, petitioners sought a warrant to search the Bergers' ranch, which covers about 75,000 acres in Montana. In response to their application, a federal magistrate judge issued a search warrant for the Berger ranch, which authorized the search of the ranch and all appurtenant structures, excluding the residence, for evidence indicating the illegal taking of wildlife. *Id.* at 5a. The reasonableness and validity of the search warrant has never been in question in these proceedings.[2]

Shortly before the federal agents applied for the warrant, they had been approached by employees of Turner Broadcasting System (TBS) and Cable News Network (CNN) to discuss whether an arrangement could be worked out to allow them to accompany the federal agents and observe and report on their conduct in executing the warrant. The court below described their respective objectives as follows: "The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime." Pet. App. 4a.

After some discussion of the matter, petitioner Kris McLean, the Assistant United States Attorney in charge of the Berger investigation, ultimately reached a letter agreement with an employee of CNN, confirming that the Office of the United States Attorney for the District of Montana would allow CNN to accompany federal agents "as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." Pet. App. 4a. The parties

---

[2] Petitioners also applied for and obtained seizure warrants for two trucks owned by Mr. Berger, which were executed on the same day that the search was conducted. *See* J.A. 28-43; Excerpts of Record (in the Court of Appeals) (hereafter "E.R.") Tab 5, Exh. G. The courts below followed the Bergers' complaint by focusing solely on petitioners' execution of the search warrant. *See* Pet. App. 28a; *id.* at 9a-10a.

specifically contemplated that CNN would shoot video footage of the agents' attempt to execute the search warrant, but place the videotape under embargo until the parties could be certain that its broadcast would not affect any resulting criminal proceedings before a jury. *Id.* at 4a-5a. Each of the parties complied with the terms of this agreement in all respects.

B. The Execution of the Search Warrant.

On the morning of March 24, 1993, a team of federal law enforcement officers, accompanied by the assistant federal prosecutor and a CNN media crew, proceeded to a point near the Bergers' ranch. The officers were audiotaped and videotaped by the media crew at all times. Mr. Berger met them on the road leading up to the ranch. The officers informed Mr. Berger that they were there to execute a search warrant, and he took them up to his residence. Mr. Berger consented to a request to enter, and they entered the house to explain to Mrs. Berger what the officers were doing there. Pet. App. 6a.

Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew and the assistant prosecutor accompanied and observed the officers, and the media crew recorded the officers' conduct in executing the warrant. The assistant prosecutor and the media crew, however, did not actively participate in the search for evidence and did not seize any tangible items. Pet. App. 36a.

The evidence gathered by the law enforcement officers later served as a basis for the federal prosecution of Mr. Berger. Kris McLean, the Assistant United States Attorney who had accompanied the officers in their search of the ranch, served on the prosecution's trial team. In that proceeding, Mr. Berger filed a motion to suppress, contending that the warrant was defective and the officers lacked probable cause to search the property. The motion to suppress evidence was denied. Pet. App. 7a. A jury ultimately convicted Mr. Berger of using a registered pesticide (Furadan) in a manner inconsistent with its labeling in violation of 7 U.S.C. § 136j(a)(2)(G). Pet. App. 7a. He was acquitted on various other counts. Subsequent to Mr. Berger's

conviction, but prior to his sentencing by the magistrate judge, CNN broadcasted some of the video footage in a news story about ranchers killing predators, which featured the investigation and prosecution of Mr. Berger. *Id.* at 28a.

C. The District Court Proceedings.

The Bergers sued petitioners and the media under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging that their constitutional rights were violated. They also alleged trespass against the media crew and the assistant prosecutor who had accompanied the officers as they executed the warrant. In addition, they raised various other federal and state law claims against the media, including conversion, intentional infliction of emotional distress, and violation of the federal wiretap statute.

The principal contentions underlying the *Bivens* claim were that the federal officers violated the Fourth Amendment by permitting the media crew to film their execution of the search warrant, and that the media had acted sufficiently in concert with the officers to be treated as government actors for purposes of this lawsuit. Pet. App. 2a. Petitioners moved to dismiss the *Bivens* claim, or in the alternative for summary judgment, raising the defense of qualified immunity.

The District Court treated the motion as one for summary judgment, and upheld the defense of qualified immunity. The court began by recognizing, correctly, that the plaintiffs bore "the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act," which requires a survey of the legal landscape "as it existed at the time of the conduct in question." Pet. App. 31a. The court stated that it would begin with binding Supreme Court or Ninth Circuit precedent, and in its absence would proceed to consider all available decisional law that preceded the actions in question. *Id.*

The court concluded that there was *no* authority -- binding or otherwise -- holding that petitioners' conduct violated the Fourth Amendment at the time they acted. Indeed, such law as

existed at the time suggested instead that the officers' conduct was consistent with the Fourth Amendment. Based on this conclusion, and on the controlling law as articulated by the Supreme Court, the court held that the defense of qualified immunity was proper:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.
>
> No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

Pet. App. 34a (citing *Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984), *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980), and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980)).[3]

---

[3] The court also held that the Bergers were collaterally estopped from relitigating the reasonableness of the search because those same issues had been decided adversely to Mr. Berger in his criminal trial, Pet. App. 39a-40a; that the media had not become government actors for purposes of *Bivens* liability, *id.*; and that the Bergers had not sufficiently established their federal wiretap claim or their common law claims, *id.* at 41a-46a.

D. The Decision by the Court of Appeals.

The Ninth Circuit reversed. On qualified immunity, in particular, the court held that "even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a (citing *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995)). The court turned on its head this Court's standard approach to determining whether the law was clearly established at the time, stating:

> We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

Pet. App. 11a-12a.

The court declined to follow the contrary holdings on qualified immunity in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), and *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *aff'd*, 141 F.3d 111 (1998) (en banc), *cert. granted* No. 98-83, without addressing those courts' analysis. Pet. App. 12a. The court also brushed off the prior decisions to the contrary that the District Court had relied on to uphold the defense of qualified immunity, opining that in those cases "the media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." *Id.* at 13a (citing *Moncrief*, *Higbee*, and *Prahl*).[4]

---

[4] The Ninth Circuit also rejected the claim of collateral estoppel and held that the media acted jointly with the federal officers and thus "under color of law." Pet. App. 3a. It reinstated the Bergers' common law claims for trespass and intentional infliction of emotional distress, but rejected their claims for conversion and for violation of the federal wiretap statute. *Id.*

SUMMARY OF ARGUMENT

The Court has directed the parties to brief both the Fourth Amendment issue and the qualified immunity issue.

First, petitioners did not violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant. In this case, it is undisputed that the search warrant was valid and that it was issued by a court upon a showing of probable cause. In addition, there is no dispute here that the officers properly executed the warrant to search the Bergers' ranch and its appurtenant structures for specific evidence of the alleged illegal taking of wildlife. The members of the news media who accompanied the officers did not actively participate in executing the warrant; they merely observed and recorded the officers' conduct and did not themselves engage in any independent search or seizure.

The Fourth Amendment permits officers who are executing a warrant to allow third parties to accompany them to aid in discharging their law enforcement mission. The conduct of the officers in this case fits comfortably within these established constitutional principles. The common practice of allowing members of the public and the news media to accompany officers and to observe and record their conduct is reasonable and helps to facilitate effective law enforcement. Publicizing the government's efforts to combat crime enhances public confidence and helps to deter crime, as the media policy contained in the United States Attorneys' Manual at the time explicitly stated. Improving public oversight of police activities through accurate media coverage is also a legitimate function of law enforcement that can reasonably be judged to deter improper conduct by law enforcement officers. In addition, in every case the law enforcement mission is aided by an accurate recording of events, by such means as audiotape or videotape.

In this case, in particular, it was reasonable for the officers to allow members of the news media to accompany them in order to observe and record their execution of the search warrant. The media personnel were limited to a purely passive

role, and petitioners were present at all times to monitor their actions. In the wake of the officers' entry and execution of a warrant to search the ranch, based on probable cause, for evidence of crime that appeared unlikely to implicate intimate personal details, any additional infringement of privacy by the presence of a few media personnel was only marginal. And it was reasonable for petitioners to judge that the recording of video and audio footage would aid the law enforcement mission by helping to deter crime, enhancing public confidence, and creating an accurate record of events. Moreover, any improper intrusion or disclosure by officers or others can be redressed under the common law without creating a new basis for suppressing evidence in criminal prosecutions.

Second, even if the Court were to hold in this case -- as a matter of first impression -- that the officers violated the Fourth Amendment by allowing members of the news media to accompany them as they executed the warrant, petitioners are entitled to a defense of qualified immunity. At the time they acted, it was not apparent in the light of preexisting law that their conduct violated the Constitution. Indeed, the practice of news media accompanying officers to observe and report on their actions was relatively widespread, and such legal authority as existed at the time had uniformly upheld its validity. Even in the last few years, the most recent lower court opinions reveal deep divisions among judges over the question of whether these actions violate the Fourth Amendment at all. In these circumstances, to require law enforcement officers, or any public officials, to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages cannot be reconciled with the settled purposes of the qualified immunity doctrine.

ARGUMENT

Petitioners will begin by addressing the Fourth Amendment question posed by the Court, which is one of first impression. Petitioners then will proceed to discuss the controlling law that supports their defense of qualified immunity in this case.

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM AND TO OBSERVE AND RECORD THEIR EXECUTION OF A WARRANT.

Petitioners did not violate the Fourth Amendment in this case. Their actions in obtaining and executing the warrant were entirely proper. Mr. Berger challenged the legality of the officers' conduct in his criminal trial by means of a motion to suppress evidence; that motion was correctly denied. The ancillary claim raised here -- that allowing members of the news media to accompany officers merely to observe and record their execution of a warrant *ipso facto* violates the Fourth Amendment and renders inadmissible any evidence generated by their search -- should be rejected also.

A. The Warrant Was Valid and Was Issued by a Court upon a Showing of Probable Cause.

The District Court noted in this case that the federal officers were acting pursuant to a valid search warrant. Pet. App. 30a ("The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents *executing a valid search warrant* allowed representatives of the news media to observe and document the search.") (emphasis added).

Petitioners applied for a search warrant on March 18, 1993; the application was approved and the warrant was issued on the same day. J.A. 17-18. Probable cause to issue the warrant was established through the accompanying affidavit submitted by petitioner Hanlon, a special agent of the U.S. Fish and Wildlife Service. *Id.* at 19-26. Hanlon's sworn statement noted that federal agents had been investigating the poisoning of eagles and other migratory birds on the Bergers' ranch since January 1993. It discussed information that had been received from state wildlife officials indicating that Mr. Berger had used poisons to kill eagles on his ranch, and described interviews that had been conducted with three former employees of Mr.

Berger, which supported those allegations. *Id.* at 21-24. Hanlon also performed a records check to locate the Bergers' land before applying for the search warrant. *Id.* at 24, 26.

Petitioners' application sought permission to search the Bergers' ranch and its appurtenant structures, excluding the residence, for evidence that would document the taking of wildlife in violation of federal law. *Id.* at 19. U.S. Magistrate Judge Robert Holter approved the application and issued the search warrant, which commanded "any authorized officer of the United States" to search those premises for items described with the requisite particularity as "documents, records, coyote getters, cyanide charges, chemicals, livestock carcasses and wildlife carcasses, including eagles, which would document the taking of wildlife in violation of Federal laws." *Id.* at 17-18. Judge Holter directed that the search could be made at any time between 6:00 a.m. and 10:00 p.m. on or before March 26, 1993. Upon execution of the search warrant, the officers were ordered to leave a copy of the warrant and a receipt for any person or property taken from the premises, to prepare a written inventory of any person or property seized, and to return the warrant promptly to the judge. *Id.*; *see* Fed. R. Crim. P. 41.

Before his criminal trial, Mr. Berger challenged the validity of the search warrant in a motion to suppress evidence. *See* Pet. App. 8a-9a. He contended that the supporting affidavits failed to establish probable cause for the issuance of the warrant, challenging both the veracity of the informants and the extent to which their statements had been independently corroborated. Mr. Berger also challenged the search warrant on the basis of staleness, and claimed that the property designated in the warrant was improperly described. *Id.* Magistrate Judge Richard W. Anderson denied the motion to suppress, upholding the validity of the search warrant on all grounds. *Id.*; *see also*

E.R. Tab 5, Exh. G, at 3-5.[5] Thus it is clear that the officers properly obtained a valid search warrant in this case.

B. The Officers Properly Executed the Warrant to Search the Ranch for Evidence of Crimes.

On the morning of March 24, 1993, the federal officers, the assistant federal prosecutor, and the media crew proceeded to a point near the Bergers' ranch. Pet. App. 6a. The timing of the search was within the parameters set forth in the warrant. The events were being recorded on videotape and audiotape, which is permissible under state and federal law -- indeed, both courts below expressly rejected respondents' claims that these actions gave rise to a tort of conversion under Montana law, *see id.* at 43a-44a; *id.* at 24a-25a, and that they violated the Federal Wiretap Act, *see id.* at 41a-42a; *id.* at 21a-22a.

Mr. Berger met the officers on the road outside the ranch. Petitioner Scrafford informed him of the search warrant and served it upon him, in compliance with the requirements of federal law. *See* 18 U.S.C. § 3105 (specifying who may serve a search warrant). He also asked permission to ride with Mr. Berger onto the ranch, and to enter the Bergers' house in order to explain to Mrs. Berger what they were going to do. Mr. Berger consented to this entry, and they entered the house and conversed with Mrs. Berger. Pet. App. 6a.[6] The rest of the group followed them onto the property, and the federal officers spent most of the day executing the warrant by searching the ranch and outbuildings for the items described with particularity in the warrant. The officers followed the procedures specified in the warrant, which included making an inventory of the

---

[5] The media defendants have asserted this ruling as the basis for a claim of collateral estoppel on the Fourth Amendment issue, a claim that was accepted by the District Court, *see* Pet. App. 39a-40a, but rejected by the Court of Appeals, *see id.* at 7a-9a. At this juncture, the issue has no bearing on the Court's consideration of the Fourth Amendment issue.

[6] Although respondents had disputed whether Mr. Berger consented to this entry, the Court of Appeals was able to resolve this issue by noting that his consent was indicated by audio recorded at the site. Pet. App. 6a.

property seized. The officers' conduct in executing the warrant was recorded on more than eight hours of sound recordings and video footage, which reveal no improprieties in complying with the substance and scope of the search warrant. *See id.*; *id.* at 34a ("otherwise valid search"). The District Court also found that the "execution of the warrant was not disrupted by the presence of the media." *Id.* at 45a.

In the motion to suppress evidence, Mr. Berger challenged the execution of the warrant, claiming that the officers seized evidence improperly because the warrant did not describe the premises accurately. Although the magistrate judge found that the officers had "grossly" overstated the amount of real estate owned by Mr. Berger, he observed that "not every technical defect offends the constitution," and ruled that the evidence had been properly seized because it was found on the deeded lands. E.R. Tab 5, Exh. G, at 4. He therefore denied the motion. *Id.* at 5. Evidence gathered during the search of the ranch was later admitted for use during Mr. Berger's criminal trial.

C. The Members of the News Media Did Not Actively Participate in Executing the Warrant and Did Not Conduct Any Search or Seizure.

The District Court stated that this case does not involve a situation in which the media actively participated in searching for or seizing evidence; rather, the media defendants were "simply observing the agents who were serving the warrant." Pet. App. 36a. The same was true of the assistant federal prosecutor, who was not himself authorized to serve or execute the warrant, and who took no active role in the search. And though the court below referred to the officers' active "planning, cooperation and assistance to the media that occurred in this case," *id.* at 12a, it never suggested that the media actively participated in the officers' search of the ranch.

Indeed, the District Court relied on this distinction to dismiss several cases cited by respondents, which involved third parties who accompanied officers and "who actively participated with the officers in a search for evidence" that was unauthorized because the items that the third parties searched

for were not mentioned or specified in the warrant. Pet. App. 33a (distinguishing *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982), and *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (per curiam)). *See also* Pet. App. 34a (distinguishing *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), because "the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant"). In such cases, the Fourth Amendment is violated because the third parties are enlisted to engage in conduct that is forbidden to the officers because it exceeds the scope of the warrant. In this case, however, the members of the news media were neither encouraged nor permitted to engage in any such conduct.

Moreover, under the Court's settled precedents, the officers and the media did not engage in an independent search when they made a video and audio recording of the officers' actions in executing the search warrant. The officers did not violate the Fourth Amendment by carrying a radio transmitter onto the ranch to record their conversations, even though its existence was concealed from the Bergers. *See, e.g., United States v. White*, 401 U.S. 745, 753 (1971) (no search because no invasion of any reasonable expectation of privacy, as "we are not prepared to hold that a defendant who has no constitutional right to exclude the [officer's] unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question"); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same result because "the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose"); *On Lee v. United States*, 343 U.S. 747, 752 (1952) (dismissing as "verging on the frivolous" the claim that wiring an agent for sound to be transmitted to a nearby receiving set was in violation of the Fourth Amendment); *see also United States v. Caceres*, 440 U.S. 741, 750-52 (1979) (reaffirming these decisions and holding that an individual's claim to privacy is not protected in this situation, which "does not raise any constitutional questions").

Similarly, the officers and the media did not violate the Fourth Amendment by videotaping the events. The same logic that the Court has applied to audiotaping, in the series of cases cited in the previous paragraph, applies with equal force to videotaping. There is no search here either, for as the Court concluded in *White*, there is no invasion of any reasonable expectation of privacy; on the contrary, "a defendant who has no constitutional right to exclude the [officer's] unaided testimony" about what he saw has no "Fourth Amendment privilege against a more accurate version of the events in question." 401 U.S. at 753. Matters that were in plain view could be observed and thus recorded by the officers or by third parties acting at their behest without constituting an independent search within the meaning of the Fourth Amendment. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion); *see also Weeks v. United States*, 232 U.S. 383, 397 (1914) ("a search ordinarily implies a quest").

Indeed, this case can be viewed as presenting the obverse of the rule adopted in *United States v. Jacobsen*, 466 U.S. 109 (1984), where the Court held that "additional invasions of respondent's privacy by the government agency must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115. In that case, law enforcement officers acting without a warrant repeated a search that had already been performed by private employees, and by that means observed matters that had already been revealed in the course of that prior private search. The Court determined that their actions did not amount to an independent intrusion and thus "infringed no legitimate expectation of privacy . . . within the meaning of the Fourth Amendment." *Id.* at 120. By the same token, in this case the media did not actively participate in executing the warrant, and did not independently engage in any search; instead, they merely observed and recorded what occurred as the officers properly executed the search warrant. According to *Jacobsen*, therefore, their purely passive conduct did not amount to an independent intrusion and similarly did not

constitute any new or separate violation of the Fourth Amendment. *Id.*

In addition, the recording of video and audio footage did not constitute a seizure in violation of the Fourth Amendment. In rejecting respondents' claim for conversion, the District Court noted that the media did not seize any tangible items, including any of the persons or property described with particularity in the search warrant. Pet. App. 43a. Instead, they merely observed and recorded what the officers themselves saw and heard as they executed the warrant. The resulting video and audio footage documented nothing but "recorded sounds and images," all of which were already open to observation by the officers. *Id.* Under *Jacobsen*, again, no seizure occurs within the meaning of the Fourth Amendment because there is no "meaningful interference with a person's possessory interests in that property." 466 U.S. at 113; *see Hicks*, 480 U.S. 321, 324 (1987) (recording serial numbers observed on stereo equipment did not meaningfully interfere with anyone's possessory interest and hence is not a seizure); *United States v. Karo*, 468 U.S. 705, 712 (1984) (placing electronic tracking device in container does not interfere with anyone's possessory interest in a meaningful way and hence is not a seizure); *see also White*, 401 U.S. at 753 (device merely used to obtain "a more accurate version of the events in question"); *Lopez*, 373 U.S. at 439 (device merely used "to obtain the most reliable evidence" of events in which government agent participated).

Thus, no independent search or seizure occurred in this case apart from the officers' own actions in properly executing the search warrant.[7]

---

[7] For these reasons, the federal statute which identifies who may serve search warrants, 18 U.S.C. § 3105, is inapplicable in the circumstances of this case, where only the officers served and executed the search warrant.

D. The Fourth Amendment Permits Officers Who Are Executing a Warrant to Allow Third Parties to Accompany Them to Aid in Discharging Their Law Enforcement Mission.

The foregoing discussion establishes that the officers did not violate the Fourth Amendment by their own actions in searching for and seizing evidence in this case, and they did not permit the media to engage in any independent search or seizure. The only remaining issue here, therefore, is whether the Fourth Amendment is violated by the mere presence of third parties, such as members of the news media, when officers are properly executing a valid warrant.

The proper legal framework for determining this issue is the "general touchstone of reasonableness which governs Fourth Amendment analysis," including "the manner of executing a search warrant." *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam)); *see also Michigan v. Summers*, 452 U.S. 692, 699-700 (1981) (Court applies "the ultimate standard of reasonableness embodied in the Fourth Amendment" to judge the propriety of any additional intrusions that are effected in executing a search warrant). Applying the reasonableness standard in this context, the Court has noted that "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia v. United States*, 441 U.S. 238, 257 (1979).

Instead, the Court has held that the Fourth Amendment and precedent impose "only three" specific requirements on the content of search warrants: (1) that they be issued by neutral and detached magistrates; (2) that they be based on probable cause; and (3) that they describe with particularity the place to be searched and the things to be seized. *Id.* at 255. Above and beyond these requirements, the manner of executing a warrant is left in the first instance to the officers' discretion, subject only to judicial review of the reasonableness of their conduct after the fact:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant -- subject, of course, to the general Fourth Amendment protection "against unreasonable searches and seizures."

Id. at 257.

The discretion that officers are afforded when they execute a warrant includes the authority to determine when third parties may accompany them. The warrant in this case, in line with consistent practice in other jurisdictions, was directed only to any "Authorized Officer of the United States." J.A. 17-18 (search warrant). It has long been understood, however, that officers who are authorized to serve and execute a warrant have reasonable discretion to allow third parties to accompany them in order to further their law enforcement mission. For example, in legions of cases officers have recruited individuals to go along as they execute a search warrant inside a home in order to help them determine what evidence should be identified and seized; the courts have routinely upheld this practice as consistent with the Fourth Amendment, even though the presence of such individuals was not authorized by the warrant. *See, e.g., State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (victims of theft accompanied officers in search of defendant's home for stolen property); *People v. Superior Ct.*, 598 P.2d 877, 881 (Cal. 1979) (same); *Commonwealth v. Farrar*, 413 A.2d 1094, 1096-99 (Pa. Super. 1979) (private citizens accompanied officers executing search warrant in defendant's home for stolen property). These permissible third parties may even be ancillary personnel with no personal knowledge of the crime being investigated. *State v. Wade*, 544 So. 2d 1028, 1030-31 (Fla. App. 1989) (police allowed

computer company employees to accompany them in executing search warrant inside a home to identify stolen computer equipment); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam) (police allowed telephone company employees to accompany them in executing search warrant inside a home and to identify telephone company property not listed in the warrant); *People v. Turner*, 57 Cal. Rptr. 854, 865 (Ct. App. 1967) (police allowed employer's fraud investigators to accompany them into employee's home to execute search warrant).

By the same token, law enforcement officers may have other good reasons to allow third parties to accompany and observe their conduct in executing a warrant, even though the third parties are not directly assisting them in conducting a search for evidence. It would be appropriate, for instance, for officers to bring colleagues along with them for purposes of supervision or evaluation. *Cf. Crowder v. Sinyard*, 884 F.2d 804, 819 (5th Cir. 1989) ("the presence and participation of additional officers," even unauthorized officers from other jurisdictions who were present "to provide expert guidance" does not "render unlawful an intrusion by other officers who are properly on the scene"). It would also be appropriate, as in this case, for officers to allow an attorney to accompany them who did not assist in executing the warrant but who was likely to be involved in prosecuting any ensuing criminal charges. *See* Pet. App. 6a; *see also Kelley v. State*, 315 S.E.2d 916, 919 (Ga. App. 1984) (no Fourth Amendment violation where "Assistant United States Attorney was a mere observer of the search and did not participate in it"). And it would be appropriate for officers who properly desired to videotape or photograph the scene of a search or an arrest to allow third parties to accompany them for that purpose, so that they could concentrate their own efforts and attention on executing the

warrant. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996).[8]

The rationale for this limited discretion recognizes that the marginal infringement on privacy by having one or a few persons accompany officers who are already lawfully making an entry pursuant to a warrant is simply not of the same magnitude as the infringement effectuated by the initial entry itself. *See, e.g., Summers*, 452 U.S. at 701-03 (even the forcible detention of an individual "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant," which already constitutes "a substantial invasion of the privacy of the persons who resided there"). Again, as in *Jacobsen*, the impact of any "additional invasions of . . . privacy" must be assessed "by the degree to which they exceeded the scope of the [initial] search." 466 U.S. at 115. And this same line of reasoning has led the Court to hold that electronic recording of conversations between an individual and a government agent does not violate the Fourth Amendment, *see White*, 401 U.S. at 753, whereas electronic eavesdropping on private conversations may do so, *see Katz v. United States*, 389 U.S. 347 (1967).

At all times, however, the officers executing the warrant are "responsible for appropriately limiting a civilian's role in the conduct of a warranted search." *Commonwealth v. Sbordone*, 678 N.E.2d 1184, 1189 (Mass. 1997). If the third parties present on the scene take an active part in executing the warrant or are permitted to engage in their own independent search or seizure of items not covered by the warrant, then the

---

[8] In *Stack*, the officers' application for a search warrant actually mentioned that they planned to photograph and videotape their execution of the warrant. In our view, it was unnecessary to seek such permission, since these actions do not constitute an independent search or seizure. *See supra* Part IC. But the important holding in the case was that the officers did not need specific authorization to allow a media crew to accompany them in order to carry out this task: "even though the warrant said nothing about a television crew," the officers were justified "in permitting the accompaniment of camera personnel." 96 F.3d at 163.

Fourth Amendment is violated, regardless of whether the officers encouraged or sanctioned their conduct. *See, e.g.*, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (Fourth Amendment violated when private security officer accompanied police and performed independent search for items not specified in the warrant); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988) (same).

E. The Common Practice of Allowing News Media to Accompany Officers and to Observe and Record Their Conduct Is Reasonable and Helps to Facilitate Effective Law Enforcement.

In many cases over many years, officers have permitted third-party members of the news media to accompany them and to observe and record their entry on private premises, for purposes such as to facilitate accurate news coverage or to deter criminals by publicizing their crimefighting efforts. *See, e.g.*, *Rogers v. Buckel*, 615 N.E.2d 669 (Ohio Ct. App. 1992) (media accompanied officers into home); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. Ct. App. 1990) (same); *Scott v. State*, 559 So. 2d 269, 272 (Fla. Ct. App. 1990) (same); *Miller v. NBC*, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986) (same); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984) (same); *Anderson v. WROC-TV*, 441 N.Y.2d 220 (Ct. App. 1981) (same); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (same); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980) (same). In none of these cases was such conduct found to have violated the Fourth Amendment. *But see Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).

On the contrary, officers have been generally understood to exercise reasonable discretion about when it would further their law enforcement mission to permit members of the news media to accompany them in executing a warrant, as long as the officers appropriately limit the media's involvement and do not permit them to engage in any independent search or seizure of evidence. Indeed, this common practice mirrors a standard policy in virtually every jurisdiction, which authorizes law

enforcement to permit members of the general public to "ride along" with officers and to observe them performing their official duties. The practice of "media ride alongs" is so pervasive, in fact, that some courts long ago found that the practice already had qualified as a "common custom and usage" under the common law. *See, e.g., Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 915-17 (Fla. 1976) (allowing media to accompany officers when they enter private property "is a widespread practice of long-standing"), *cert. denied*, 431 U.S. 930 (1977); *see also infra* Part IID (discussing cases).

In these situations, officers can reasonably determine that once they are already making a valid entry onto the premises pursuant to a warrant, the marginal effects of allowing members of the news media to accompany them may be outweighed by the many sound justifications for allowing media to observe and record their conduct in executing the warrant. For example, a major objective that is served by this practice is to publicize the government's efforts to combat crime. Handled with appropriate care, this is a legitimate law enforcement objective, for publicizing the fight against crime is itself a valuable weapon in helping to deter crime. *See, e.g., Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (referring to need for IRS to "inform the public" so as to "deter violations of the law"). Indeed, the media policy contained in the United States Attorneys' Manual at the time recognized this fact by authorizing Department personnel to "assist the news media in photographing, taping, recording, or televising a law enforcement activity," in order to "promote the aims of law enforcement, including the deterrence of criminal conduct." *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII(B) (Assisting the News Media) (as amended Jan.14, 1993) (reprinted in the Appendix to this brief) (hereafter "App."). *See also infra* note 13.

Other reasonable objectives may also be served by this practice. The oversight function of the press has been widely remarked, and the presence of third parties could serve in some situations to minimize police abuses and protect suspects. *See, e.g., Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998) (en

banc), *cert. granted* No. 98-83; *cf. People v. Boyd*, 474 N.Y.S.2d 661, 665 (Sup. Ct. 1984) ("the presence of the corroboration witness provides a fair method for augmented assurance that the warrant will not be executed with excess"). In other situations, officers could reasonably determine that the presence of media or other third parties would help to protect the safety of the officers. *See Wilson*, 141 F.3d at 118. Moreover, in many situations, officers are assisted by having an audio and video recording of their actions, which presents "a more accurate version of the events in question." *White*, 401 U.S. at 753; *see Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996) (describing use of "mounted video camera" to record details of routine traffic stop). Disputes over what was said or done, which may become issues in related criminal proceedings or create the potential for later civil liability, can be put to rest by referring to a tape that constitutes "the most reliable evidence possible" of activities in which the officers participated and which they were "fully entitled to disclose." *Lopez*, 373 U.S. at 439. *See, e.g., United States v. Hubbard*, 493 F. Supp. 209, 230-31 (D.D.C. 1979) (taking of photographs that "accurately record the events of the search" is "a good police practice").

It is also "a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities." *See Wilson*, 141 F.3d at 118. Indeed, the media ride-along policy issued by the U.S. Marshals Service in *Wilson* "indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest." *Id.* In the same vein, the media policy contained in the United States Attorneys' Manual at the time of the events in this case noted that such activities could serve to "promote the aims of law enforcement, including . . . the enhancement of public confidence." U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000, section VIIB (App.). This Court has likewise noted in other contexts that public access to otherwise private facts may be justified in some instances to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dept. of Defense v. FLRA*,

510 U.S. 487, 497 (1994) (FOIA). How law enforcement officers are waging the fight against crime is a proper matter of public interest, as even the common law has recognized in fashioning its legal protections for individual privacy.[9] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion) ("especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results"); *id.* at 604 (Blackmun, J., concurring) ("public has an intense interest and deserved right to know" about "the administration of justice," "the prosecution of local crimes," and "the conduct of . . . police officers").

Indeed, a ruling that law enforcement officers can *never* allow members of the news media to accompany them in order to observe and report on their execution of a warrant would mean that all such activity, which is rife with the potential for abuse, would henceforth occur in secret. This approach would sharply clash with the Court's frequent endorsement of Justice Brandeis' observation that "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quotation omitted). The resulting closed regime of law enforcement operations would disserve, rather than further, the fundamental interests that the Fourth Amendment is designed to protect. And such a draconian and categorical rule

---

[9] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D, comment g ("Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news,'" including "homicide and other crimes, arrests, police raids"); *id.*, comment f ("Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed," as they constitute "involuntary public figures"). *See also Taylor v. KTVB, Inc.*, 525 P.2d 984, 986 (Idaho 1974) ("The authorities writing in the area of invasion of privacy have all assumed and concluded that reports of governmental action in criminal matters are the legitimate province of a free press.").

would be unfaithful to the pragmatic "reasonableness" standard that is the touchstone of Fourth Amendment analysis.

Of course, none of the reasons discussed above would *mandate* that police must allow the presence of third parties, civilian employees, prosecutors, or members of the news media at the scene of a police raid. In many instances, indeed, officers may well judge that it is neither prudent nor desirable to do so. And certainly the press can claim no *right* to be present at the scene. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."); *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937) (newspaper publisher "has no special privilege to invade the rights and liberties of others"). But the issue here is different and the claim is more modest: officers in particular cases are permitted to exercise reasonable discretion about whether allowing members of the news media to accompany them merely in order to observe and record the execution of a warrant will further their law enforcement mission.

F. In This Case, It Was Reasonable for Petitioners to Allow Members of the News Media to Accompany Them and Observe and Record Them Executing the Search Warrant.

It remains, then, to apply the foregoing analysis to the facts of this case. In performing the requisite Fourth Amendment inquiry into the reasonableness of petitioners' conduct, "it is necessary to examine both the character of the official intrusion and its justification." *Summers*, 452 U.S. at 701.

Here, petitioners had already procured a valid search warrant for the Berger ranch, which authorized a "substantial invasion of privacy" that resulted in an all-day search of the premises for evidence of crime. *Id.* The media presence was limited to three people, who accompanied approximately twenty officers who were engaged in executing the warrant. Care was taken to limit the media to a purely passive role that did not include engaging in any independent search or seizure of evidence. The officers were present at all times and able to

monitor the media's actions, which also were circumscribed by the terms of a written agreement that was designed to prevent any potential publicity from interfering with an ensuing criminal prosecution. *See* J.A. 90-91. The alleged crimes which gave rise to the search did not appear to involve any intensely private matters or intimate personal details.

On the other side of the scale, petitioners could make a reasonable judgment that allowing members of the news media to accompany them in order to observe and record their actions would be beneficial to their law enforcement mission.[10] The media personnel were present to gather news through video and audio footage that petitioners determined would be useful to their law enforcement mission by helping to publicize their efforts to combat environmental crime. Pet. App. 4a. This determination was reasonable and indeed was in accord with the Justice Department's media policy in place at the time. *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000, section VIIB (App.). At the same time, the media's involvement was likely to "promote the aims of law enforcement" by "enhanc[ing] public confidence" in their activities and objectives. *See id.*

The media also made an audio and video recording of the officers' actions in executing the warrant that was likely to prove useful as "the most reliable evidence possible" of the events. *Lopez*, 373 U.S. at 439. Indeed, in this case, that is precisely what happened. One of respondents' allegations was that Mr. Berger never gave consent for petitioner Scrafford to enter the residence. *See* J.A. 119 (¶ 45). If correct, this fact would establish a violation of the Fourth Amendment, for the Bergers' residence was explicitly excluded from the scope of

---

[10] As in any case applying the Fourth Amendment, the actual subjective motivations of individual officers are irrelevant to the analysis of whether their conduct was objectively "reasonable." *Scott v. United States*, 436 U.S. 128, 137 (1978). And by the same token, relating to the legal analysis in Part II, *infra*, the Court has stressed that "[e]vidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity] defense." *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

the warrant. Pet. App. 5a. Yet the court below was able to resolve this dispute conclusively because "[a]udio recorded at the site indicates that Mr. Berger consented to Agent Scrafford's entry into the home at this time." *Id.* at 6a; *cf. Robinette*, 117 S. Ct. at 421 (use of videotape would aid in resolving fact-specific inquiry into whether "a consent to search may be deemed voluntary"). Similarly, one of the issues that surfaced in Mr. Berger's motion to suppress evidence in his criminal case was the location of the evidence that was seized from the ranch, whose parameters were not described correctly in the warrant. *See* E.R. Tab 5, Exh. G, at 4. The videotape of the search and seizures that occurred at the ranch could again be of assistance in resolving this kind of disputed issue. *See, e.g., United States v. Nicholson*, 17 F.3d 1294, 1296 (10th Cir. 1994) (videotape of search reviewed to resolve suppression issue).

Indeed, similar reasoning was thought to justify the presence of petitioner McLean at the ranch. McLean is a lawyer, not a law enforcement officer authorized to serve warrants. *See* Fed. R. Crim. P. 41(h) ("federal law enforcement officer" as used in this rule means "any government agent, other than an attorney for the government"). He was not involved in executing the warrant, did not assist the officers in doing so, and did not take part in the search. His presence at the scene was related to furthering the law enforcement mission only in a more tangential way -- he was the assistant prosecutor who probably would be involved in prosecuting any criminal charges that might be brought against Mr. Berger. In the end, this turned out to be the case: McLean did serve as part of the prosecution trial team that obtained Mr. Berger's conviction.

In the circumstances, the officers could make a reasonable judgment that McLean's presence on the premises, observing the execution of the warrant, would be helpful in facilitating the broader goals of effective law enforcement, even though he provided no immediate assistance to the officers in executing the warrant or searching for evidence. *See, e.g., Kelley*, 315 S.E.2d at 919 (no Fourth Amendment violation where Assistant United States Attorney "was a mere observer and did not

participate in the search").[11] But the categorical ruling sought by respondents would not permit such reasonable judgments to be made, and would open up broad new vistas for finding constitutional violations based on whether third parties like McLean, members of the news media, or others were ever permitted to be present and to witness the execution of a warrant. This approach would be completely out of step with the "general touchstone of reasonableness which governs Fourth Amendment analysis." *Ramirez*, 118 S. Ct. at 996.

In the circumstances of this case, therefore, the manner in which petitioners executed the search warrant was reasonable and did not violate the Fourth Amendment.

G. Any Improper Intrusion or Disclosure by Officers or Others Can Be Redressed Under the Common Law Without Creating a Further Basis for Suppressing Evidence.

If the Court were to hold in this case that the officers violated the Fourth Amendment simply by allowing third parties to accompany them as they executed the warrant, this holding would provide an additional basis for suppressing the evidence that was generated by their investigative efforts. In the criminal proceedings against Mr. Berger, therefore, the defense motion to suppress should have been granted and the prosecution correspondingly impeded, even though it is acknowledged that the warrant was valid and the search was properly executed by the officers themselves. *See, e.g.*, Pet. App. 34a ("otherwise valid search"). Such a holding also would hamstring the legitimate discretion of officers in deciding how best to execute a warrant and further their law enforcement mission in particular instances. If any third parties came to be present at the scene, and the officers made a

---

[11] *See, e.g., Wilson*, 141 F.3d at 118 (emphasizing that it is crucial to the Fourth Amendment analysis "to understand the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose").

reasoned judgment not to eject them or made reasonable but inadequate efforts to do so, this categorical rule would again provide a basis for suppressing any evidence they uncovered.

None of this is necessary in order to ensure that citizens are able to seek redress for any improper intrusion or disclosure committed by officers or by accompanying third parties. As in this case, petitioners and the members of the news media can be sued for trespass, various privacy torts, or intentional infliction of emotional distress. Any such claims brought against federal officials are processed against the United States, but do not subject the individual officers to personal liability for money damages. *See* 28 U.S.C. § 2679(d)(1). These measures are adequate to protect the privacy interests of individual citizens without reaching out to fashion any supplemental basis for relief, grounded in the Constitution, on top of the remedies already available at the common law.

This case (and many cases like it) presents a useful example of the kinds of remedies that can be pursued by individuals who feel aggrieved by such conduct. Respondents sued the members of the news media under the common law for trespass, conversion, and intentional infliction of emotional distress. The District Court dismissed all of their common-law claims, but the Court of Appeals reinstated their claims for trespass and for intentional infliction of emotional distress. It is clear from the case law that third parties who choose to accompany law enforcement officers onto the premises of others do so at their own risk, and may be held liable in tort if a court later determines that they should not have been present. *See, e.g., Miller*, 187 Cal. App. 3d at 1480-81, 232 Cal. Rptr. at 677 (holding media could be liable for trespass when they entered a residence to cover a news story); *Anderson*, 441 N.Y.2d at 227 (same); *Prahl*, 295 N.W.2d at 780 (same).

Indeed, the *Restatement (Second) of Torts* addresses the circumstances in which such conduct may give rise to a common-law claim for intrusion upon seclusion, one of the privacy torts. Section 652B of the *Restatement* states that:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. This cause of action affords the basis for a jury trial on claims that the media have intruded upon seclusion when they accompanied police officers into the home. *See, e.g., Rogers*, 615 N.E.2d at 672-73 (remanding for jury trial on whether media committed tort of invasion of privacy by accompanying officers into a home to film a drug raid); *Magenis*, 798 P.2d at 1110-11 (affirming jury verdict for media who were sued for entering home during police narcotics raid and holding that many factual matters bear on the jury's determination of whether an intrusion is "highly offensive"); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971) (affirming jury verdict for plaintiff against media who were sued for entering home to photograph and audiotape him pursuant to arrangement with district attorney's office, based on state tort law, and declining to address constitutional claim raised under the Fourth Amendment).

Significantly, the common law makes a distinction between the act of intruding upon seclusion, which is defined as one form of privacy tort, and the separate act of later publishing private facts, which is defined as another form of privacy tort. Section 652D of the *Restatement* deals with the latter situation:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id. Thus the subsequent act of publicity gives rise to a very different claim even under the common law, and one that has nothing to do with the Fourth Amendment issues raised in this case. Indeed, where officers properly execute a valid warrant, and later act improperly by publicizing private information or

giving it to the media for publication, their conduct is actionable under the common law or perhaps the Due Process Clause, but it does not retroactively create a violation of the Fourth Amendment. *See, e.g., Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969) (improper release of information by police to radio station is not actionable under federal law); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (police officer taking nude photographs of assault victim and circulating them to other officers is actionable under Due Process Clause as arbitrary conduct that shocks the conscience), *cert. denied*, 376 U.S. 939 (1964); *cf. The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (newspaper published name of rape victim after obtaining it from publicly released police report).

Given the remedies available for redress under state common law, there is no reason to strain to find that the facts of this case violate the Fourth Amendment, which would justify a motion to suppress evidence in any related criminal proceeding and would bar officers from making reasonable judgments about when it is appropriate and will further their law enforcement mission to allow news media to attend and observe the execution of a warrant.

II. IF IN THIS CASE THE COURT HOLDS FOR THE FIRST TIME THAT THIS CONDUCT VIOLATES THE FOURTH AMENDMENT, PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME THEY ACTED.

The ruling below departs radically from the doctrine of qualified immunity that the Court has extended to state and local officials. The Fourth Amendment issue raised in this case has not been definitively determined by the precedents of this Court or any other court; presents a hotly disputed question on the merits; had been decided in favor of the constitutionality of petitioners' conduct in several decisions rendered before they acted; and at the time of their actions had never been decided adversely to such conduct by *any* court *anywhere*. In these circumstances, the Court's precedents uniformly uphold

petitioners' defense of qualified immunity from the constitutional claim asserted in this lawsuit.

A. Officials Are Shielded from Personal Liability by the Defense of Qualified Immunity Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law.

The Court has settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The purpose of this doctrine is to alleviate concern that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them from their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Crawford-El v. Britton*, 118 S. Ct. 1584, 1593 n.2 (1998).

To this end, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear

that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.* In making this determination, which is a pure question of law, a court should "use its 'full knowledge of its own [and other relevant] precedents,'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), and thus it is proper to look to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). *See also Scherer*, 468 U.S. at 192 & n.9.

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Instead of applying the governing principles laid down by this Court, the court below turned the traditional qualified immunity inquiry upside-down. In rejecting the defense raised by petitioners in this case, the Ninth Circuit purported to find "even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of" such conduct. Pet. App. 11a-12a. That observation, however, is entirely irrelevant to the proper legal analysis. The District Court already had correctly discredited this argument when plaintiffs put it forward on the motion for summary judgment:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

Pet. App. 34a.

In the circumstances presented here, the proper resolution of the Fourth Amendment issue was not apparent in the light of preexisting law. The Court has not squarely addressed the general issue of when third parties may accompany officers in executing a warrant, and is going to decide the specific issue involving news media for the first time in this very case. The Ninth Circuit itself had no clear precedent addressing or foreclosing the issue, but looked to a decision by the Second Circuit that it viewed as persuasive, even though that decision postdated the events at issue here and was itself in conflict with other circuit precedents. *See* Pet. App. 10a-11a (citing *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995)). The only precedent from any court within the Ninth Circuit that existed at the time was the unpublished decision in *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980), which had upheld the constitutionality of such conduct. Against that legal landscape, which will be discussed in more detail below, petitioners were entitled to qualified immunity because they "could not reasonably be expected to anticipate subsequent legal developments, nor could [they] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

Nor may a court in this situation saddle public officials with personal liability merely because it may be adamantly

persuaded that its own legal judgments should have been obvious on their face to everyone at all times. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341. Only in the most egregious circumstances would it be appropriate to apply a kind of "Nuremberg" reasoning to expose public officials to the prospect of paying money damages out of their own pockets for violations that courts discover in hindsight but that were not clearly addressed or foreclosed by prior precedents. As the discussion in Part I, *supra*, makes clear, however, this is not such a case.

B. At the Time Petitioners Acted, Courts Uniformly Held that the Constitution Allows Officers to Permit News Media to Accompany Them to Observe and Record Their Execution of a Warrant, and Justice Department Policy Endorsed the Practice.

At the time petitioners executed the warrant in this case -- March 24, 1993 -- the scanty case law uniformly held that allowing members of the news media to accompany officers in order to observe and record the execution of a warrant did not violate anyone's constitutional rights. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980); *see also Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984) (holding that such conduct does not infringe any fundamental right triggering more exacting equal protection scrutiny). In addition, this practice was endorsed by the media policy that was contained at the time in the United States Attorneys' Manual issued by the Justice Department. *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII(B) (Assisting the News Media) (as amended Jan.14, 1993) (App.).

In *Moncrief*, for example, a husband and wife filed suit under 42 U.S.C. § 1983, alleging that the police entered their house improperly to execute a search warrant, accompanied by members of the news media. After the officers entered, they handcuffed the husband, and the media was allowed to photograph him in this state, which caused him embarrassment and humiliation. 10 Med. L. Rptr. at 1620-21. After rejecting the claim that the search warrant was invalid, the District Court addressed the plaintiffs' claim that the officers had violated their "right to privacy under the Fourth Amendment by allowing the media to enter their premises along with the police officers and take photographs." *Id.* at 1621. The court found that these allegations did not state a proper claim for the deprivation of any constitutional right, for "the right to be free from unwanted publicity about one's affairs" is protected by the common law, not by the Fourth Amendment, and therefore such conduct does not fall within the "zone of privacy set out in the Constitution as being federally protected." *Id.* at 1622.

Similarly, in *Higbee*, the plaintiffs claimed that their constitutional rights were violated when law-enforcement officials invited the press to be present and to take photographs during the execution of a search warrant at plaintiffs' residence. A photograph of the inside of the residence was later published in the newspaper. 5 Med. L. Rptr. at 2372. Rejecting plaintiffs' claim, the District Court held that the constitutional "right to privacy" was not infringed except in cases "involving gross abuses." No such "gross abuse" or independent violation of the protected zone of privacy occurred, however, where police merely allowed members of the news media to observe and record the proper execution of a valid warrant. *Id.* The court dismissed the action, noting that plaintiffs' pendent claim for invasion of privacy under California tort law should be allowed to proceed in the state courts. *Id.* at 2373.

In *Prahl*, a television newscaster heard reports that a SWAT team was called to a residence where shots had been fired. He was allowed to join the officers and to observe and film their actions in entering the residence, confiscating the guns, and interviewing the suspect. A story on the incident ran

on the local television news later that day. The suspect, who was never charged, sued the officers and the newscaster under section 1983, alleging that his constitutional rights were violated "by an unreasonable search and seizure" and by "the filming and broadcasting of that search and seizure without his consent." 295 N.W.2d at 773-74. The trial court dismissed this claim, and the court of appeals affirmed, stating that it was "unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." *Id.* at 774. The court ruled, however, that plaintiff's claim for trespass against the officers and the newscaster would be permitted to proceed on remand to the trial court. *Id.* at 778-82.

These decisions establish that at the time petitioners acted, the courts had uniformly rejected claims that their actions violated the Fourth Amendment or any other provision of the Constitution.[12] *See also Scott v. State*, 559 So. 2d 269, 272 (Fla. App. 1990) (rejecting motion to suppress evidence where sheriff's deputies "permitted a television crew to enter the home during the execution of the warrant," finding no violation of the Fourth Amendment). Instead, allegations of injury to reputation or privacy interests stemming from such conduct were understood to be appropriately addressed under the common law in the state courts. *Cf. Paul v. Davis*, 424 U.S. 693, 699-712 (1976) (such matters are actionable under state tort law, not the Federal Constitution).

In addition, the media policy that was contained at the time in the United States Attorneys' Manual endorsed the practice of allowing officers to "assist the news media in photographing, taping, recording, or televising a law enforcement activity." *See* U.S. Dep't of Justice, *United States Attorneys' Manual*

[12] The court below brushed aside these contrary decisions by briskly declaring -- with no supporting legal or factual authority -- that there had been greater cooperation between the officers and the media in this case than in those three situations. *See* Pet. App. 12a-13a. This supposedly material observation is a classic distinction without a difference, as long as the media do not participate in the execution of the warrant.

§ 1-.000, section VII(B) (App.). As happened in this case, personnel who obtained approval from the U.S. Attorney's office were authorized to assist the news media in these ways in order to "promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence." *Id.* The existence of this policy reinforces the fact that the law at the time was not understood to establish, let alone "clearly establish," that petitioners' conduct was in violation of the Fourth Amendment.[13]

On the contrary, the existence of the Justice Department policy itself provides strong support for petitioners' claim that they are entitled to qualified immunity in this case. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (officers were entitled to qualified immunity for implementing established policy upheld in one previous case and never before held unconstitutional), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (if officers "were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability"); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (qualified immunity is proper where officers followed longstanding, though unwritten, policy laid down by superiors and not found improper by any court), *cert. denied*, 451 U.S. 969 (1981).

[13] The media policy contained in the United States Attorneys' Manual is reprinted in relevant part in the Appendix to this brief. The relevant portion of the policy is section VII, entitled "Assisting the News Media." As set forth in the Appendix, the version in effect from January 14, 1993 to May 3, 1993 contained language allowing media observation and taping of *all* law enforcement activities, including the execution of a warrant. On May 3, 1993, however -- *postdating* the events of this case -- additional language was added that imposed new restrictions on media observation and taping of the execution of a warrant. *See* App. at A1-A2.

C. At the Time Petitioners Acted, No Court Had Ever Held that Their Conduct Violated the Fourth Amendment and Hence They Are Entitled to Qualified Immunity.

In fact, at the time petitioners acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. All of the cases that the court below relied on for its constitutional analysis *postdated* their conduct. *See* Pet. App. 10a-13a. In this posture, the Ninth Circuit could not legitimately invalidate their defense of qualified immunity.

In particular, the court below relied on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), as holding that "even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a. Even the District Court's ruling in *Ayeni* postdated the actions at issue here. *See Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994).

On the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), this reliance on subsequent decisions is improper and requires reversal. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See Mitchell*, 472 U.S. at 533 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972)). Within days after the officials authorized the wiretap challenged

in *Mitchell*, two other federal courts had held such conduct to be illegal, but those decisions postdated the events in question. *See* 472 U.S. at 533.

Accepting the federal officials' defense of qualified immunity, the Court held that in light of the two unpublished decisions extant at the time, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. Under *Harlow*, "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Supreme Court itself intervened to decide the issue two years later. *Id.*

The holding in *Mitchell* is decisive in favor of petitioners' claim to qualified immunity in this case.[14] Several decisions at the time had rejected claims that such conduct violated federal constitutional rights, and no decision had accepted such a claim. The Court has granted a writ of *certiorari* to address the issue for the first time in this case and in *Wilson v. Layne*, No. 98-83. And the Court has repeatedly admonished the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). When the Ninth Circuit last departed from this admonition, this Court summarily reversed, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*

---

[14] *See also Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (pointing out that because the *Ayeni* decision was not rendered until "after the police in this case executed their search, [it] cannot weigh in the balance against a finding of qualified immunity"), *cert. denied*, 117 S. Ct. 1081 (1997); *Wilson*, 141 F.3d at 117 ("Reliance on decisions issued after the events underlying this litigation, whether the decisions were decided by this court or others, is inappropriate.") (citing *Mitchell*).

v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341). The availability of a defense of qualified immunity is equally clear in this case.

D. It Has Long Been Common Practice to Allow News Media to Accompany and Observe Officers' Law Enforcement Activities.

The total absence of precedent upholding respondents' constitutional claim as of March 1993 is reinforced by the fact that it has long been a common and accepted practice to allow media to accompany officers in order to observe and record their law enforcement activities. *See, e.g.*, Richard Zoglin, *Live on the Vice Beat*, TIME, Dec. 22, 1986, at 60 (referring to "the increasingly common practice of letting TV crews tag along on drug raids").

For example, in *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977), a house caught on fire while the owner was absent. The police and fire departments responded to a call from a neighbor and extinguished the blaze, but not until after a child was killed. "When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice." *Id.* at 915. The media representatives accompanied the officers into the home, observed the investigation, and took several pictures that were used in the investigation and also served as the basis for a later story in the local newspaper. Plaintiff, the owner of the house, learned about the fire and the death of her daughter by reading the newspaper story and viewing the published photographs. *Id.* at 915-16. She sued the newspaper for trespass, invasion of privacy, and intentional infliction of emotional distress. The underlying events occurred in 1972.

The trial court granted summary judgment for the newspaper on the trespass claim, noting that there was implied consent to the entry based on common custom and usage. In particular:

> "Not only did the Fire Marshal and Detective Sergeant Short testify that it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin."

Id. at 916 (quoting trial court opinion). In addition, similar affidavits were filed by the Associated Press, United Press International, several television stations, and more than a dozen newspapers nationwide, "all attesting that it is common usage, custom and practice for news media to enter private premises and homes under circumstances like those here." *Id.* at 916-17.

The court of appeals reversed the grant of summary judgment on the trespass claim and remanded for trial. On further review, the Florida Supreme Court reinstated the trial court's grant of summary judgment for defendant, stressing the invitation to enter by the officers, and concluding:

> The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere. This, in itself, tends to indicate that the practice has been accepted by the general public since it is a widespread practice of long-standing.

Id. at 918-19 (quotation omitted).

Various other state courts have since rejected the holding of the *Fletcher* case on the implied consent issue. *See, e.g.*, *Anderson*, 441 N.Y.2d at 227 (granting summary judgment to plaintiffs and holding that implied consent by custom and practice is no defense to trespass claim); *Prahl*, 295 N.W.2d at 780 (denying summary judgment and refusing as a matter of law to imply consent from custom and practice). But the important point here is not the details of state trespass law; it is the fact that the practice of news media accompanying officers

onto private premises as they investigate crimes and newsworthy events has been widespread in this country for at least 25 years. Indeed, on remand in the *Prahl* case, the trial court concluded on the basis of further submissions that in 1982 "'a common and accepted custom [existed] in the State of Wisconsin and nationally for reporters and photographers to accompany public officers and firemen onto private premises where newsworthy events of general public interest such as crime, shootings, fires or storms have or are occurring.'" MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 397 (5th ed. 1995) (quoting trial court opinion on remand).

This history of media ride-alongs, coupled with the extensive case law that had considered and addressed the practice without ever finding that it violated the Constitution, *see supra* Parts IE & 2B (citing and discussing cases), reinforces the inevitable conclusion that the law was not "clearly established" against the validity of such conduct at the time petitioners acted in this case.

E. Relevant Decisions and the Debate in this Case Show that It Is Not Evident, Even Now, that Petitioners Violated the Fourth Amendment.

It is also pertinent that the proper resolution of the Fourth Amendment issue presented in this case plainly is not obvious, even today, to many of the federal and state judges who have grappled with it. The most direct indication of this uncertainty is the Court's decision to grant *certiorari* and decide the Fourth Amendment issue in this case and in the *Wilson* case, which spawned sharply conflicting decisions in the courts below.[15]

---

[15] In *Wilson*, the District Court found that the officers had violated the Fourth Amendment and rejected their defense of qualified immunity, but a panel of the Fourth Circuit reversed, and the full court sitting *en banc* agreed with the panel. *See Wilson*, 141 F.3d at 113. In this case, the District Court accepted petitioners' defense of qualified immunity, judging that the law was still evolving on the Fourth Amendment issue, but a panel of the Ninth Circuit reversed, and the full court declined to rehear the case *en banc*.

See Mitchell, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to decide it and give it "the definitive answer that it demanded"). And Part I, *supra*, discusses in greater detail all the reasons why petitioners' conduct does not violate the Fourth Amendment at all.

The lower courts are still divided on the underlying constitutional issue, six years after the events of this case. In *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), the panel split on the issue. The two Judges Arnold held that it was not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant." *Id.* at 448. Judge Rosenbaum, concurring separately, concluded that admitting representatives of the news media into the home without securing the resident's express consent did violate the Fourth Amendment. *Id.* at 448 (Rosenbaum, J., concurring). But all three judges found that the officers were entitled to qualified immunity, since even the most recent decisions "would appear to us to indicate at most only the beginnings of a trend in the law." *Id.* at 447 (majority opinion).

Similarly, in *Wilson*, the majority of the *en banc* court stated that "reasonable jurists can differ" on the Fourth Amendment issue posed in this case. 141 F.3d at 117. They noted, in particular, that "reasonable officers may have perceived that permitting the reporters to accompany them served a legitimate law enforcement function." *Id.* at 118. Judge Murnaghan and the other dissenting judges strenuously disagreed, though they acknowledged that the U.S. Marshals Service actually had in effect at the time a "media ride-along policy" that governed situations where members of the news media would accompany officers to observe and report on their actions. *Id.* (Murnaghan, J., dissenting).

Other courts have now held that law enforcement officers violate the Fourth Amendment when they allow members of the

news media to accompany them and to observe and record their execution of a warrant. *See, e.g., Hagler v. Philadelphia Newspapers, Inc.*, 1996 WL 408605, Civ. No. 96-2154 (E.D. Pa. July 12, 1996). These courts agree with the Second Circuit's holding in *Ayeni* that officers violate the Fourth Amendment when they bring into the home third parties who are "neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there," in order "to magnify needlessly the impairment of their right of privacy." 35 F.3d at 686. As discussed in Part IE, *supra*, however, it is far from clear that the presence of news media cannot reasonably be judged to serve a "legitimate law enforcement purpose."[16] Moreover, the court's conclusion in *Ayeni* that photographing or videotaping events which are in the officers' plain view amounts to a seizure under the Fourth Amendment, *see id.* at 688, is almost certainly incorrect, as explained more fully in Part IC, *supra*.

In addition, the *Ayeni* holding has been roundly criticized for having departed from this Court's treatment of qualified immunity claims by failing "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms." *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995). The *Ayeni* court had found that the law was "clearly established" because it has "long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties." 35 F.3d at 686. The *Bills* court commented that it is "hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard." 52 F.3d at 602. Such

[16] The Fourth Circuit was emphatic on this point in *Wilson*, stressing the importance of understanding "the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose." 141 F.3d at 118.

generalization of the Fourth Amendment would reduce the doctrine of qualified immunity to "a mere rule of pleading." *Id.*

This criticism is consistent with the Court's precedents governing the application of qualified immunity. In *Anderson*, the Court noted that operation of the qualified immunity standard greatly depends upon the level of generality at which the relevant "legal rule" is identified. 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at an abstract level of generality thus would eviscerate the important protections that the Court affords through the doctrine of qualified immunity. *Id.*

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their duties with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Only by faithful application of these settled principles can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Scherer*, 468 U.S. at 195. Once again, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In the circumstances at issue here, petitioners cannot plausibly be placed in either category. *See Bills*, 52 F.3d at 603 ("The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined.").[17]

[17] As the Court has said about the "fair notice" requirement in the criminal law, the situation here is one where "disparate decisions in various Circuits might leave the law insufficiently certain" to be "clearly established." *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997).

Only by upholding petitioners' defense of qualified immunity would the Court remain faithful to its consistent warning that public officials are not required and "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. That would be precisely the effect if the Court were to reject petitioners' defense of qualified immunity here. Particularly where -- as here and as in *Mitchell* -- there is no preexisting authority that clearly establishes the law one way or the other, and other lower court decisions had uniformly held that such conduct was lawful, this landscape should be the decisive factor which requires the defense of qualified immunity to be upheld.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded with instructions to dismiss the *Bivens* claim brought against petitioners.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
ANDREW B. CLUBOK
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

December 1998

APPENDIX

APPENDIX

U.S. Department of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy) (as amended Jan. 14, 1993), stated as follows:

1-7.000

MEDIA POLICY

The purpose of this policy statement is to establish specific guidelines consistent with the provisions of 28 CFR 50.2 governing the release of information relating to criminal and civil cases and matters by all components (FBI, DEA, INS, BOP, USMS, USAO, and DOJ divisions) and personnel of the Department of Justice.

* * *

VII. ASSISTING THE NEWS MEDIA

A. Other than by reason of a Court order, Department personnel shall not prevent the lawful efforts of the news media to photograph, tape, record or televise a sealed crime scene from outside the sealed perimeter.

B. In order to promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence, Department personnel with the prior approval of the appropriate United States Attorney may assist the news media in photographing, taping, recording or televising a law enforcement activity. The United States Attorney shall consider whether such assistance would:

1. unreasonably endanger any individual;

2. prejudice the rights of any party or other person; and

3. is not otherwise proscribed by law.

C. A news release should contain a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[end of Section VII]

* * *

[end of Policy]

** *A further amendment to the policy, dated May 3, 1993, stated as follows:*

Please insert the additional language in your United States Attorneys' Manual at 1-7.000, VII. D.

VII. ASSISTING THE NEWS MEDIA

D. In cases in which a search warrant or arrest warrant is to be executed, no advance information will be provided to the news media about actions to be taken by law enforcement personnel, nor shall media representatives be solicited or invited to be present. This prohibition will also apply to operations in preparation for the execution of warrants, and to any multi-agency action in which Department personnel participate.

If news media representatives are present, Justice Department personnel may request them to withdraw voluntarily if their presence puts the operation or the safety of individuals in jeopardy. If the news media declines to withdraw, Department personnel should consider cancelling the action if that is a practical alternative.

Exceptions to the above policy may be granted in extraordinary circumstances by the Office of Public Affairs.

[end of amendment]

(5)

No. 97-1927

Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RODNEY C. HANLON, *et al.*,
Petitioners,

v.

PAUL W. BERGER, *et ux.*, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, AND JACK HAMANN IN SUPPORT OF PETITIONERS

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK, INC.
One CNN Center
P.O. Box 105366
Atlanta, GA 30348-5366

P. CAMERON DEVORE *
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC M. STAHL
DAVID BOWMAN
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

58pp

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to the defense of qualified immunity?

PARTIES TO THE PROCEEDINGS

Cable News Network, Inc., a twenty-four-hour television news network, its parent company Turner Broadcasting System, Inc. ("Turner"), and Jack Hamann, Robert Rainey and Donald Hooper, journalists employed by the network (collectively, "CNN" or "CNN Respondents"), are Respondents submitting this brief in support of the Petitioners in *Hanlon v. Berger*, No. 97-1927, pursuant to Rule 12.6 of the Rules of this Court. The CNN Respondents, along with Petitioners Rodney Hanlon, Joel Scrafford, Kris A. McLean, Richard C. Branzell, and Robert Priekstat ("Petitioners"), and the United States of America, were appellees in the Ninth Circuit decision and defendants in the district court decisions below. CNN joins with Petitioners in urging reversal of the Ninth Circuit judgment.

This action began as two proceedings in the United States District Court for the District of Montana, both initiated by Respondents Paul and Erma Berger. One named as defendants the Petitioners (who are four United States Fish and Wildlife Service agents and an Assistant United States Attorney) and the United States of America, as well as Turner and journalists Rainey and Hooper. The other named as defendants Cable News Network, Inc. and reporter Hamann. The district court issued separate but, with respect to the CNN Respondents, materially identical opinions. On appeal by the Bergers, the Ninth Circuit treated the cases as one and issued a single judgment, reversing in part summary judgment that had been entered in favor of the CNN Respondents and the Petitioners.

Petitioners and CNN filed separate petitions for *certiorari* seeking review of the Ninth Circuit opinion. The United States did not seek review. CNN's Petition, No. 97-1914, which presents an additional question not included in the instant case, is still pending.* In this brief

* CNN's pending Petition presents a question separate from that to be reviewed in the instant case: whether members of the news media who observe government agents executing a warrant are state actors such that they may be subjected to constitutional liability as if they were government officers themselves.

in support of the Petitioners, CNN addresses the first Question Presented—that is, whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record the officers' execution of an otherwise valid warrant. CNN does not seek relief from this Court under the second Question Presented—whether the government agents are entitled to a defense of qualified immunity—and therefore this brief does not address that question.

Pursuant to Rule 29.6 of the Rules of this Court, Respondents Cable News Network, Inc. and Turner state the following: Time Warner Inc. is the parent company of Respondent Turner which, in turn, is the parent company of Respondent Cable News Network, Inc. Neither Turner nor Cable News Network, Inc. has any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Reporter Hamann's Investigation of Wildlife Enforcement Efforts	2
B. CNN's Observation of the FWS Execution of the Warrants	4
C. Proceedings Before the District Court	6
D. Proceedings Before the Ninth Circuit	7
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THE LAW ENFORCEMENT GRANT OF PERMISSION TO CNN TO OBSERVE THE EXECUTION OF THE WARRANTS AND CNN'S OBSERVATION WAS NOT A "SEARCH" OR "SEIZURE" PROSCRIBED BY THE FOURTH AMENDMENT	10
A. The Presence of CNN During the Agents' Search of the Bergers' Ranchlands and Outbuildings and the Recording of Consensual Conversations Between the Bergers and Two Agents Did Not Violate an Expectation of Privacy Recognized by the Fourth Amendment	11
B. The Agents' Grant of Permission to CNN to Videotape the Agents' Search of the Bergers' Ranchlands and Outbuildings and the Resulting Videotaping Were Not a Fourth Amendment "Seizure."	18

TABLE OF CONTENTS—Continued

Page

II. EVEN IF THE FOURTH AMENDMENT APPLIES TO THE BERGERS' FIELDS, OUTBUILDINGS, AND CONSENSUAL CONVERSATIONS WITH FWS AGENTS, THE EXPECTATION OF PRIVACY IN PREVENTING ANY INCREMENTAL STIGMA CAUSED BY PUBLICITY OF THE SEARCH SHOULD YIELD TO THE IMPORTANT LAW ENFORCEMENT INTERESTS SERVED THROUGH THE AGENTS' GRANT OF ACCESS TO CNN 20

A. The Government Interests Served by the FWS Grant of Permission to CNN to Observe the Execution of the Warrants Are Significant 21

1. Informing the Public About the Performance of Inherently Coercive Government Functions Is a Public Interest of Great Import and a Duty of Law Enforcement 24

2. Informing the Public About Law Enforcement Efforts to Discover and Investigate Crime Is a Critical Tool in Deterring Future Crimes 29

3. The Presence of Reporters as Witnesses to the Execution of Warrants Reduces the Prospect of Police Misconduct and Promotes Officer Safety 32

B. The Asserted Interest in Automatically Shielding Law Enforcement Action From Public Exposure Is Anathema to Our Democratic System 34

C. The Fourth Amendment Balance Weighs in Favor of Public Access Here 39

CONCLUSION 47

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Arizona v. Hicks, 480 U.S. 321 (1987) 19
Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984) 40
Aversa v. United States, 99 F.3d 1200 (1st Cir. 1996) 30
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994) 7, 34
Berger v. CNN, Inc., 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996) 1
Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) 40
Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) 6, 7, 8, 16, 37
Boyd v. United States, 116 U.S. 616 (1886) 12
Brower v. County of Inyo, 489 U.S. 593 (1989) 22
Brown v. Reno, 584 F. Supp. 504 (S.D. Fla. 1984) 27
Brown v. Texas, 443 U.S. 47 (1979) 42
Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 27
Cady v. Dombrowski, 413 U.S. 433 (1973) 24
California v. Ciraolo, 476 U.S. 207 (1986) 11, 12
Camara v. Municipal Court, 387 U.S. 523 (1967) 22
Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co., 435 F.2d 470 (7th Cir. 1970) 28
Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) 26
Dalia v. United States, 441 U.S. 238 (1979) 44
Gockley v. VanHoove, 409 F. Supp. 645 (E.D. Pa. 1976) 27
Graham v. Connor, 490 U.S. 386 (1989) 22
Griffin v. Wisconsin, 483 U.S. 868 (1987) 43
Harris v. United States, 331 U.S. 145 (1947) 21, 39
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) 44, 45
Hester v. United States, 265 U.S. 57 (1924) 12
Hicks v. Cassilly, 971 F. Supp. 956 (D. Md. 1997), *rev'd on other grounds*, 153 F.3d 720 (4th Cir. 1998) 37, 38

Higbee v. Times-Advocate, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980) 46
Hoffa v. United States, 385 U.S. 293 (1966) 17, 18
Horton v. California, 496 U.S. 128 (1990) 22
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 44
Katz v. United States, 389 U.S. 347 (1967) 11
Knowles v. Iowa, 119 S. Ct. 484 (1998) 32
Lopez v. United States, 373 U.S. 427 (1963) 17, 18
Maryland v. Buie, 494 U.S. 325 (1990) 20, 21, 39, 42, 46, 47
Maryland v. Macon, 472 U.S. 463 (1985) 11
Maryland v. Wilson, 117 S. Ct. 882 (1997) 20
Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 31, 32, 42, 43
Michigan v. Summers, 452 U.S. 692 (1981) ...20, 38, 40, 41
Michigan v. Tyler, 436 U.S. 499 (1978) 10
Mills v. Alabama, 384 U.S. 214 (1966) 23
Minnesota v. Carter, 119 S. Ct. 469 (1998) 15, 16, 18
Moncrief v. Hanton, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio 1984) 38, 40, 46
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 25
National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 42
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 25
New Jersey v. T.L.O., 469 U.S. 325 (1985) 20, 42
New York v. Burger, 482 U.S. 691 (1987) 43
In re Oliver, 333 U.S. 257 (1948) 25
Oliver v. United States, 466 U.S. 170 (1984) 12, 13, 16
Paul v. Davis, 424 U.S. 693 (1976) 36, 37
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 20
Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) 25
Reeves v. Fox Television Network, 983 F. Supp. 703 (N.D. Ohio 1997) 26, 33
Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100 (D. Colo. 1971) 28

TABLE OF AUTHORITIES—Continued

Page
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 24, 25, 26
Sallie v. North Carolina, 587 F.2d 636 (4th Cir. 1978) 19
Schmerber v. California, 384 U.S. 757 (1966) 20
Siegert v. Gilley, 500 U.S. 226 (1991) 37
Skinner v. Railway Labor Executives Ass'n 489 U.S. 602 (1989) 42
Smith v. Maryland, 442 U.S. 735 (1979) 11
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996) 45
Terry v. Ohio, 392 U.S. 1 (1968) ...11, 20,21,32, 34, 41, 43
United States v. Appelquist, 145 F.3d 976 (8th Cir. 1998) 39
United States v. Berger, CR 93-46-BLG-JDS (D. Mont. Oct. 20, 1993) 6
United States v. Biswell, 406 U.S. 311 (1972) 43
United States v. Brady, 993 F.2d 177 (9th Cir. 1993) 13, 14
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 42
United States v. Calabrese, 825 F.2d 1342 (9th Cir. 1987) 13
United States v. Chadwick, 433 U.S. 1 (1977) 20
United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) 22, 45, 46
United States v. Dunn, 480 U.S. 294 (1987) 13, 14, 18
United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995) 13
United States v. Jacobsen, 466 U.S. 109 (1984) 19
United States v. Knotts, 460 U.S. 276 (1983) 12
United States v. Ludwig, 902 F. Supp. 121 (W. D. Tex. 1995) 19
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 32
United States v. McKeever, 5 F.3d 863 (5th Cir. 1993) 14
United States v. Place, 462 U.S. 696 (1983) 10
United States v. Rapanos, 115 F.3d 367 (6th Cir.), *cert. denied*, 118 S. Ct. 304 (1997) 14

TABLE OF AUTHORITIES—Continued

Page

United States v. Redmon, 138 F.3d 1109 (7th Cir.), *petition for cert. filed*, 67 U.S.L.W. 3149 (June 8, 1998) (No. 98-243) 13
United States v. Santa Maria, 15 F.3d 879 (9th Cir. 1994) 14
United States v. Spikes, 158 F.3d 913 (6th Cir. 1998) 34
United States v. Stegmaier, 397 F. Supp. 611 (E.D. Pa. 1975), *aff'd*, 538 F.2d 321 (3d Cir. 1976) 23
United States v. Taketa, 923 F.2d 665 (9th Cir. 1991) 15, 18
United States v. Traynor, 990 F.2d 1153 (9th Cir. 1993) 13
United States v. Van Damme, 48 F.3d 461 (9th Cir. 1995) 14
United States v. White, 401 U.S. 745 (1971) 17, 18
United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 46
Wilson v. Arkansas, 514 U.S. 927 (1995) 22
Wilson v. Layne, 141 F.3d 111 (4th Cir.) (en banc), *cert. granted in part*, 119 S. Ct. 443 (1998) 19, 23, 29, 34, 39, 44
Whren v. United States, 517 U.S. 806 (1996) 22
Wyman v. James, 400 U.S. 309 (1971) 43

STATE CASES

Commonwealth v. Farrar, 413 A.2d 1094 (Pa. 1979) 46
Dubbs v. State, 157 S.W.2d 643 (Tex. Crim. App. 1942) 19
Huggins v. State, 861 P.2d 1007 (Okla. Ct. App. 1993) 23, 45, 46
Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981) 12
Oden v. Reader, 935 S.W.2d 470 (Tex. App. 1996) 27
People v. Boyd, 474 N.Y.S.2d 661 (N.Y. Sup. Ct. 1984) 23, 40, 41, 46
People v. Maltese, 540 N.Y.S.2d 817 (N.Y. App. Div. 1989) 19

TABLE OF AUTHORITIES—Continued

page

Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980) 46
Sims v. Barnes, 689 N.E.2d 734 (Ind. Ct. App. 1997), *review denied*, 698 N.E.2d 1191 (Ind. 1998) 27
Schultz v. State, 593 P.2d 640 (Alaska 1979) 19
State v. Dickerson, 313 N.W.2d 526 (Iowa 1981) 11, 19
State v. Eggleston, 671 N.E.2d 1325 (Ohio Ct. App. 1996) 31
State v. Klosterman, 317 N.W.2d 796 (N.D. 1982) 23
State v. Louis, 672 P.2d 708 (Or. 1983) 19
State v. Magnano, 528 A.2d 760 (Conn. 1987) 19
State v. Scigliano, 583 P.2d 893 (Ariz. 1978) 23, 41, 45, 46
State v. Superior Court of Marin County, 598 P.2d 877 (Cal. 1979) 23, 45, 46

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. I 36
U.S. CONST. amend. IV ..... *passim*
U.S. CONST. amend. V 36, 37
U.S. CONST. amend. IX 36
U.S. CONST. amend. XIV 36
7 U.S.C. § 136j (a) (2) (G) 6
18 U.S.C. §§ 2511, *et seq.* 6, 9
28 U.S.C. § 1254 (1) 2
42 U.S.C. § 1983 36

MISCELLANEOUS

Harold Barney, *Community Relations, in Some Concepts of Administrative Training* 69 (Police Management Institute 1969) 29, 30
William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, 15 Modern Policing 231 (Michael Tonry & Norval Morris eds. 1992) 27

TABLE OF AUTHORITIES—Continued

	Page
William P. Georges, *DWI Blanket Patrol: An Innovative, Effective Approach*, The Police Chief, Nov. 1992	30
Charles D. Hale, *Police Patrol* (1981)	26, 27
R. Bruce Holmgren, *Primary Police Functions* (1960)	30
Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States* (1998)	33
David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449 (1997)	29
Manual of the Los Angeles Police Department § 420.10 (1992)	27
Robert J. Owens, *Local Environmental Prosecutions: Coordinating Law Enforcement and Regulatory Agency Resources*, 7 Fordham Envtl. L.J. 909 (1996)	30, 31
The Relative Merits of Unmarked vs. Marked Patrol Cars, The Police Chief, July 1996	31
Roscoe B. Starek, III & Lynda M. Rozell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. Marshall J. Computer & Info. L. 679 (1997)	31

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

No. 97-1927

RODNEY C. HANLON, *et al.*,
Petitioners,
v.
PAUL W. BERGER, *et ux.*, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS CABLE NEWS NETWORK, INC., TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, AND JACK HAMANN IN SUPPORT OF PETITIONERS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 129 F.3d 505 and is reprinted in the Appendix to the Petitioners' Petition for *Certiorari* ("Pet. App.") at 1a-26a. The district court order in *Berger v. Hanlon* was not reported (except at 24 Media L. Rep. (BNA) 1748 (D. Mont. 1996)) and is reprinted at Pet. App. 27a-47a.[1]

[1] The district court's decision in *Berger v. CNN, Inc.* was not reported (except at 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996)), was not appended to the Petitioners' Petition for *Certiorari*, and is not cited to herein. That decision is materially identical to the district court's decision in *Berger v. Hanlon* in all respects relating to the CNN Respondents.

STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit entered judgment on November 13, 1997 and denied petitions for rehearing and suggestions for rehearing *en banc* from Petitioners and the CNN Respondents on February 25, 1998. *Id.* at 48a. Petitioners filed a timely petition for *certiorari* on May 26, 1998 in No. 97-1927. This Court granted *certiorari* to the Ninth Circuit on November 9, 1998, consolidating *Berger v. Hanlon* with *Wilson v. Layne*, No. 98-83. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmance, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. Reporter Hamann's Investigation of Wildlife Enforcement Efforts.

In early 1993, reporter Hamann, a Seattle-based correspondent for Cable News Network who regularly reports on environmental matters and other news from the western United States, began investigating reports that western ranchers were eluding prosecution for illegally poisoning endangered species. J.A. 131-34.[2] The reports were newsworthy for several reasons. Hamann sought to learn what, if anything, federal authorities were doing to stop illegal

[2] The Joint Appendix is referred to herein as "J.A."

wildlife killings. *Id.* He also wanted to report on the conflict between the federal government's efforts to enforce wildlife laws and the sympathies of local officials and juries toward ranchers' efforts to protect livestock from predators. *Id.*; R. 8/8, tape 11, page 2.[3]

In the course of his newsgathering, Hamann learned that the Fish and Wildlife Service ("FWS") would be conducting a search of the property of a Montana rancher suspected of poisoning wildlife. Unbeknownst to Hamann, the rancher was Paul Berger. The FWS had been investigating Mr. Berger since January 1993, when former employees of the Bergers reported that they had seen him deliberately poisoning and shooting eagles. Pet. App. 4a; R. 8/8, tape 8, page 13. The FWS investigation of Berger had begun *before* Hamann learned of the planned search of the Berger property. Pet. App. 4a.

In an effort to obtain evidence concerning their suspicions about Mr. Berger's illegal activities, the FWS sought a warrant to search the Bergers' 75,000-acre ranch near Billings, Montana. On March 18, 1993, a federal magistrate judge issued FWS agents a search warrant and two seizure warrants, authorizing them to search the ranch for evidence that wildlife were being killed in violation of federal law. *Id.* at 5a; J.A. 17-43. The validity of the warrants has never been questioned in these proceedings.

Prior to the execution of the warrants—but at least two months *after* the FWS had initiated its investigation of Berger—the FWS gave CNN permission to accompany its agents during the execution of a search. Pet. App. 4a. This permission was confirmed in a letter stating that the government "agrees to allow CNN to accompany USFWS Agents as they execute a criminal search warrant near Jordan, Montana, some time during the week of March

[3] The excerpts of record ("R.") refer to the two volumes submited by the Bergers in the appeal of the district court decision in *Berger v. Hanlon*. The references are to the tab number within the record and the exhibit within the tab.

22, 1993." The letter further stated that CNN retained "complete editorial control" over any footage it recorded of the search, but that CNN would not show any footage until such time as doing so posed no risk to any defendant's fair trial rights.[4]

B. CNN's Observation of the FWS Execution of the Warrants.

As part of its coverage of the search, CNN attended a briefing for FWS agents the day before the warrants were executed. Hamann asked several questions regarding the nature of the poisons allegedly used by Berger and local ranchers' views about federal authorities, R. 8/8, tape 5, pages 4, 6, but the record contans no evidence that CNN played any role in the briefing, assisted in planning the search, or coordinated in any way with the government beyond what was necessary to arrange to observe and record the search for newsgathering purposes.

The warrants were executed on March 24, 1993. The group of twenty-one government agents executing the warrants drove to the ranch, followed in a private vehicle by journalists Hamann, Rainey and Hooper. R. 8/7 at 27; R. 8/8, tape 6, page 3-tape 7, page 2. The CNN crew members were dressed in casual clothes, in contrast to many of the law enforcement officers on the scene who were either in uniform or wore hats or jackets with government agency patches or labels and were visibly armed with handcuffs and guns. R. 8/8, tape 6, pages 3-4. One of the government vehicles had a small, fixed CNN camera mounted on its hood facing into the vehicle. FWS agent Joel Scrafford wore a microphone that transmitted sound to the CNN crew. Pet. App. 6a; R. 8/8, tape 7, pages 1-23-tape 20, page 1.

---

[4] This was the complete substance of the letter, which is set out in its entirety in the Ninth Circuit opinion. Pet. App. 4a-5a. The letter merely confirmed that CNN had permission to accompany the government agents.

While the FWS agents executed the warrant, the journalists videotaped portions of the agents' authorized search of the ranch, its outbuildings and surrounding public roads. Pet. App. 6a. CNN never entered the Bergers' home, though Agents Scrafford and Branzell did with Mr. Berger's consent. *Id.*; R. 8/8, tape 7, page 16 (tape transcript of Berger consenting to agents' entry into house). The agents did not search for evidence inside the home. R. 2/1 ¶ 4. Mr. Berger's voluntary conversations with the FWS agents both inside and outside the house were recorded through the microphone Scrafford was wearing. Pet. App. 6a.

During the several-hour search, the CNN crew interviewed Assistant United States Attorney ("A.U.S.A.") Kris McLean who was present for the execution of the warrants. R. 8/8, tape 11, pages 2-8. Asked why the government agents permitted CNN to observe and record the search, he stated:

> Well, it's really . . . motivated by the prosecutor's self-interest in getting the word out to other people that might be contemplating these crimes right now, that, if you get caught, there are going to [sic] serious consequences. And we are watching. So you get the deterrent effect of . . . the publicity and the story that you'll do. . . .

Id. page 8. McLean also explained that local sentiment that "the government just shouldn't be interfering with us" and sympathy for "home-town" ranchers and for "the right to control predators" made federal enforcement of wildlife laws difficult. *Id.* pages 2-4. In the county where the Bergers resided, McLean said, local residents and officials, including the elected sheriff, are "very anti-government." *Id.* page 7.

Based on evidence the FWS agents lawfully obtained during the search, Berger was charged with violating a federal law that prohibits killing eagles. A jury convicted him of applying a pesticide to sheep carcasses with the

intent to kill predators, including eagles, in violation of 7 U.S.C. § 136j(a)(2)(G). He was acquitted of other charges. *United States v. Berger,* CR 93-46-BLG-JDS (D. Mont. Oct. 20, 1995). Pet. App. 7a.

Seven months after the search, and nearly two months after Berger's conviction, CNN used portions of its footage of the search on the environmental news programs "Earth Matters" and "Network Earth," as part of its news coverage of government efforts to protect endangered species. The footage made up a portion of each program. The programs were shown in October 1993 and several times in 1994. They have not been shown since. *Id.* at 2a; R. 8/9.

C. Proceedings Before the District Court.

After Paul Berger's criminal conviction, he and his wife brought these civil actions against CNN and the government. The Bergers sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), claiming (1) that the federal agents violated the Fourth Amendment by permitting the news media to attend and record the search, and (2) that by observing the search, CNN acted under color of federal law and thus was accountable for the Fourth Amendment violation as if it too were a government actor. Pet. App. 2a-3a. The Bergers also brought state law trespass, conversion and intentional infliction of emotional distress claims against CNN, *id.* at 2a, 22a-25a, and alleged that CNN violated the Federal Wiretap Act, 18 U.S.C. §§ 2511, *et seq.* Pet. App. 21a. Additionally, the Bergers sought an injunction restraining CNN's future broadcasts of its news footage. *Id.* at 25a.

The district court granted summary judgment for all defendants. The court correctly noted that to establish *Bivens* liability, the Bergers had to prove defendants (1) acted under color of federal law and (2) deprived them of a constitutionally protected right. *Id.* at 40a n.3. The

court held that the Bergers failed to establish that CNN acted under color of law, because its presence during the search was a means of furthering CNN's own private newsgathering interests. *Id.* at 40a.

As to whether the government defendants violated the Bergers' constitutional rights, the district court found that it was not clearly established that the Fourth Amendment is violated when law enforcement agents allow journalists to accompany them during the execution of a valid search warant, and therefore that the government defendants were entitled to qualified immunity. *Id.* at 30a-36a, 45a n.5. The court distinguished cases in which a private party *assisted* in executing a warrant or *participated with* government agents in the search for evidence, noting that "CNN was simply observing the agents who were serving the warrant." *Id.* at 36a. The district court also "recognize[d] the error made by the Second Circuit" in *Ayeni v. Mottola,* 35 F.3d 680 (2d Cir. 1994), in defining the Fourth Amendment right in question to be "the general Fourth Amendment right of privacy," rather than asking specifically whether police who allow journalists to observe and record the execution of a valid warrant violate a clearly established Fourth Amendment right. Pet. App. 32a-33a. "To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights." *Id.* at 34a.

D. Proceedings Before the Ninth Circuit.

The Ninth Circuit reversed. On the *Bivens* question, the court began with the premise that because of the arrangements CNN made with the FWS to facilitate its newsgathering efforts,

> [t]his was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming.

Id. at 9a-10a. Without discussing CNN's independent newsgathering purpose for observing the search and despite its private status, the Ninth Circuit found that CNN acted under color of law because it was a "willful participant in joint action with the [government] or its agents," and thus could be held liable under *Bivens*. *Id.* at 18a.

The Ninth Circuit also reversed the district court's finding that the FWS agents did not violate any clearly established Fourth Amendment right. In a one-paragraph discussion citing no case law, the Ninth Circuit held that in permitting CNN to attend and record the execution of the warrants, the Petitioners violated the Fourth Amendment. *Id.* at 9a-10a. The court reasoned that the government agents' actions were unconstitutional because they allowed CNN to "invade" the Bergers' property and because they conducted a search "intended to serve a major purpose other than law enforcement"—namely, obtaining "publicity" for the government and "material for . . . commercial programming" and "entertainment" for CNN. *Id.* at 2a, 10a. Further, the court held that it was "clearly established" at the time of the search that the agents' conduct violated the Fourth Amendment, and thus the agents could not assert a defense of qualified immunity.

The court reversed the district court's summary judgment in favor of CNN on two state law claims, and remanded for further proceedings. The court found, first, that CNN's alleged intrusion onto the Bergers' land stated a claim for common law trespass. *Id.* at 22a-23a. Second, the court held that based on this trespass and the alleged violation of their privacy, the Bergers had stated a claim for intentional infliction of emotional distress. *Id.* at 25a. The trespass and emotional distress claims are still pending, and they will be heard in the district court regardless of the outcome of the issues pending before this Court or the disposition of CNN's Petition for *Certiorari*.

The Ninth Circuit affirmed the district court's dismissal of the Bergers' claim that CNN tortiously converted their images and voices, rejected the Bergers' claim under the Wiretap Act, and denied their requested injunction, finding it would be an unconstitutional prior restraint on CNN's First Amendment right to broadcast news. *Id.* at 21a, 24a, 25a.[5]

SUMMARY OF ARGUMENT

In this case, the Court considers whether agents of the United States Fish and Wildlife Service violated the Fourth Amendment by permitting a Cable News Network reporter and two cameramen to observe and videotape the otherwise reasonable execution of valid search and seizure warrants on the 75,000-acre Montana ranch of Respondents Paul and Erma Berger. The Fourth Amendment proscription, however, applies only to a "search" or a "seizure," neither of which occurred as a result of the FWS grant of permission to CNN to observe and videotape the warrant execution. Because the Bergers' asserted privacy expectation in their ranchlands and outbuildings and in their consensual conversations with individuals they knew to be law enforcement officers is not reasonable, CNN's presence was not a Fourth Amendment search. Furthermore, because CNN's videotaping did not meaningfully interfere with the Berger's possessory interests in their property, CNN's videotaping was not a constitutional seizure.

Even if the Fourth Amendment applies here, it does not create an absolute right to preserve privacy. Rather, it contemplates that when the legitimate interests of the public and of law enforcement are significant, the individual's

---

[5] In response to CNN's Petition for *Certiorari* in this case, the Bergers filed a Conditional Cross-Petition for *Certiorari*, No. 98-38, challenging the Ninth Circuit's holdings on the latter two issues. This Court denied the Cross-Petition on November 2, 1998. 119 S. Ct. 403.

privacy expectation must yield. The Bergers assert a privacy interest in preventing publicity about the execution of the warrants. In essence, they claim that the FWS agents' execution of warrants inherently is a private event that the news media—and thus the public—may not witness without violating the Bergers' Fourth Amendment rights. In direct conflict with the Bergers' asserted privacy interest in keeping shrouded the execution of the warrants are the significant public interests served by the agents' grant of permission to the news media: enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police. Because here these important public interests in exposing government conduct to public scrutiny outweigh the Bergers' privacy interest, the grant of access to the news media was not unreasonable and the decision of the Ninth Circuit to the contrary should be reversed.

ARGUMENT

I. THE LAW ENFORCEMENT GRANT OF PERMISSION TO CNN TO OBSERVE THE EXECUTION OF THE WARRANTS AND CNN'S OBSERVATION WAS NOT A "SEARCH" OR "SEIZURE" PROSCRIBED BY THE FOURTH AMENDMENT.

Enacted to guard individuals against the exercise of unchecked government power, the Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Place*, 462 U.S. 696, 706-07 (1983) (internal quotation marks and citation omitted); *accord Michigan v. Tyler*, 436 U.S. 499, 504-05 (1978) ("[T]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.") (internal quotation marks and citations omitted). The benchmark of Fourth Amendment jurisprudence is the protection of an expectation of privacy

"that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *accord Maryland v. Macon*, 472 U.S. 463, 469 (1985); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Consequently, where an expectation of privacy is not recognized as reasonable, as here, the prerequisite "search" or "seizure" does not occur.

A. The Presence of CNN During the Agents' Search of the Bergers' Ranchlands and Outbuildings and the Recording of Consensual Conversations Between the Bergers and Two Agents Did Not Violate an Expectation of Privacy Recognized by the Fourth Amendment.

The Fourth Amendment proscribes unreasonable "searches." "A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Macon*, 472 U.S. at 469 (internal quotation marks and citation omitted); *accord Smith v. Maryland*, 442 U.S. 735, 740 (1979). Here, the Bergers have alleged an expectation of privacy in their outbuildings and fields, in Mr. Berger's presence on a county road, and in the brief consensual conversations they had with Agent Scrafford in Berger's truck and with Agents Scrafford and Branzell in the house. J.A. 57, 59-61: ¶¶ 57, 63, 65, 67, 72. Because there is no constitutionally protected privacy interest in ranchlands, outbuildings, or county roads,[6] nor

[6] There is no reasonable expectation of privacy in that which is visible from public roads and other public vantage points. *See California v. Ciraolo*, 476 U.S. 207 (1986) (observation from helicopter of activities occurring on curtilage of private residence not search because homeowner has no reasonable expectation of privacy from aerial observation); *Katz*, 389 U.S. at 351 ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."); *State v. Dickerson*, 313 N.W.2d 526, 532 (Iowa 1981) (where farmhouse was exposed to public view from highway, officers had right to go to door where visitors logically would knock to seek entrance and the "situation is not changed

in voluntary conversations with law enforcement officers, the Bergers' expectation of privacy is not reasonable.

The Fourth Amendment protects only those areas which harbor the intimate activity associated with "the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). It protects "persons, houses, papers, and effects." *Oliver v. United States*, 466 U.S. 170, 176 (1984) (internal quotation marks and citation omitted). Only the curtilage—the land immediately surrounding and associated with the home—warrants Fourth Amendment protections that attach to the home. *Id.* at 180. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Ciraolo*, 476 U.S. at 212-13.

In contrast, this Court long has held that "no expectation of privacy legitimately attaches to open fields." *Oliver*, 466 U.S. at 180; *accord United States v. Knotts*, 460 U.S. 276, 282 (1983) ("[N]o such expectation of privacy extended . . . outside the cabin in the open fields.") (internal quotation marks and citation omitted); *Hester v. United States*, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the 4th Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law.") (citation omitted). " '[O]pen fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Oliver*, 466 U.S. at 180 n.11.

---

by the photographing" of what could be seen from such vantage point); *Mark v. Seattle Times*, 635 P.2d 1081, 1095 (Wash. 1981) (television crew that filmed plaintiff by placing camera on building's front window did not invade plaintiff's privacy, because window was publicly accessible).

In determining whether the Bergers' sheds and ranchlands are within the protected curtilage of the home, the Court examines: (1) the proximity of the area to the house; (2) whether the area is included within an enclosure surrounding the home; (3) the nature and use of the area; and (4) its visibility. *United States v. Dunn*, 480 U.S. 294, 301 (1987). First, the outbuildings and fields searched by the agents—and observed and videotaped by the CNN reporters, R. 8/8, tapes 6-13, 20-22—are not "immediately surrounding and associated with the home." *Oliver*, 466 U.S. at 180.[7] Second, though the perimeter of the Bergers' ranch is fenced, the outbuildings are not included within an internal fenced-in area surrounding the house. R. 8/8; *see United States v. Ishmael*, 48 F.3d 850, 857 & n.7 (5th Cir. 1995) (steel building 200 to 300 yards from mobile home and not enclosed within fence that also surrounded home was beyond curtilage); *Brady*, 993 F.2d at 178 (building not within curtilage where fence surrounded entire property but building and house were not further enclosed within single fenced-in area); *United States v. Traynor*, 990 F.2d 1153, 1158 (9th Cir. 1993) (same). Third, the Bergers used the sheds for storage of ranch equipment and effects, including poison. J.A. 94 ¶ 10; *see Brady*, 993 F.2d at 178-79 (outbuilding not protected by Fourth Amendment where it was primarily used as marijuana growing operation, even though some evidence suggested outbuilding also used to store personal property and as play area for children). They did not lock the shed door, R. 8/8, tape 7, page 17,

---

[7] *Accord United States v. Redmon*, 138 F.3d 1109, 1114 (7th Cir. 1998) (no reasonable expectation of privacy in garbage cans left in driveway of townhouse), *petition for cert. filed*, 67 U.S.L.W. 3149 (June 8, 1998) (No. 98-243); *United States v. Brady*, 993 F.2d 177 (9th Cir. 1993) (outbuilding not within curtilage); *United States v. Calabrese*, 825 F.2d 1342, 1350 (9th Cir. 1987) (building 50 feet from house outside curtilage).

the ranch hands had access to the shed, *id.*, and the shed did not contain personal or intimate possessions. J.A. 94 ¶ 10; R. 8/8, tape 10, page 1; R. 8/8, tape 21, page 3; R. 8/8, tape 22, pages 4-5. *Compare United States v. Van Damme*, 48 F.3d 461, 465 (9th Cir. 1995) (greenhouses "entirely separate from the places of intimate activity associated with the home" are outside curtilage, so "Fourth Amendment did not entitle Van Damme to privacy from the observation"), *with United States v. Santa Maria*, 15 F.3d 879, 883 (9th Cir. 1994) (reasonable expectation of privacy in trailer outside home's curtilage where trailer was near home, was locked, and contained personal belongings). Finally, the Bergers' sheds are visible from the surrounding open fields. R. 8/8; *Brady*, 993 F.2d at 179.

Outbuildings like those on the Bergers' ranch that are physically separated from the house, not used for intimate activities of the home, and unprotected from observation by others, are beyond the curtilage of the home and, thus, not subject to Fourth Amendment protection. *Dunn*, 480 U.S. at 301, 302-03 (finding "little difficulty in concluding that this area lay outside the curtilage of the ranch house" where respondent's barn stood several dozen yards away from house on distinct portion of ranch, did not involve intimate activities of home, and remained unprotected from observation by others standing in open fields).[8] The Ninth Circuit acknowledged that the Fourth Amendment would *not* have proscribed a warrantless search by the FWS agents of the Bergers' ranchlands or outbuildings,

[8] *See, e.g., United States v. Rapanos*, 115 F.3d 367, 372-73 (6th Cir.) (175 acres of wetlands bordered by two highways was open field despite presence of locked gated entrance), *cert. denied*, 118 S. Ct. 304 (1997); *United States v. McKeever*, 5 F.3d 863, 867 (5th Cir. 1993) (brush 35 to 50 feet from house containing buckets of marijuana plants beyond curtilage).

Pet. App. 14a, recognizing *ipso facto* that the Bergers' expectation of privacy in the area outside their home's curtilage is not constitutionally reasonable. However, despite the absence of any recognized Fourth Amendment interest in the Bergers' ranchlands and outbuildings, the Ninth Circuit held that the Bergers' Fourth Amendment rights *were* violated when the agents authorized CNN to observe the open fields search. Plainly, though, no matter what the conduct at issue, the Fourth Amendment is not violated where it does not apply. *Minnesota v. Carter*, 119 S. Ct. 469, 474 (1998) ("Because we conclude that respondents had no legitimate expectation of privacy in the apartment, *we need not decide whether the police officer's observation constituted a 'search.'*") (emphasis added); *United States v. Taketa*, 923 F.2d 665, 672 (9th Cir. 1991) (if expectation of privacy is not reasonable, there can be "no fourth amendment violation regardless of the nature of the search").

The Ninth Circuit's irreconcilable holding was driven in part by its conclusion that the journalists were "trespassers."[9] Pet. App. 14a ("The open fields doctrine is

[9] Also, the Ninth Circuit found *"there is evidence in the record* that the shed and other outbuildings that were a focus of the cameras were places in which the Bergers did have a reasonable expectation of privacy, in that *they were located close to the house and guarded by a dog.*" Pet. App. 14a (emphasis added). However, *nothing* in the record supports either of these factual conclusions of the Court of Appeals, nor, for that matter, did the Bergers present the court with any such record support. In fact, the only reference in the record to a guard dog was the statement made the day *before* the search by one of the FWS agents who thought there might be a dog at the Berger ranch. R. 8/8, tape 4, page 5. The record demonstrates that *during the search* the Bergers' dog roamed freely, was well-behaved and friendly. R. 8/8, tape 7, pages 1-2; R. 8/8, tape 9, page 3; R. 8/8, tape 7, page 15; R. 8/8, tape 8, page 9.

not a license for the police to bring trespassers on to private property."); *id.* ("The officers would not have reasonably believed . . . that the open fields doctrine authorized third parties to trespass."). However, this Court has made evident that "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment." *Oliver*, 466 U.S. at 183-84; *accord Bivens*, 403 U.S. at 393-94 ("[O]ur recent decisions regarding electronic surveillance have made it clear beyond peradventure that the Fourth Amendment is not tied to the niceties of local trespass laws.") (citing *Katz*, 389 U.S. 347; *Berger v. New York*, 388 U.S. 41 (1967); *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Thus, the fact that the CNN reporters may have been trespassing has no bearing in the determination of whether the Fourth Amendment was violated.[10]

The Ninth Circuit also based its open fields holding on its erroneous conclusions that the agent's grant of permission to CNN to observe the warrant "has no law enforcement purpose." Pet. App. 14a. Consideration of law enforcement purposes, however, is relevant *only* upon a determination that the Fourth Amendment applies *in the first instance* and, thus, that the reasonableness balance must be struck. *See Carter*, 119 S. Ct. at 474. In any event, as discussed below, there were ample law enforcement interests served through the grant of access to CNN.

Also, the Bergers claim that they had an objectively reasonable expectation of privacy in the consensual conversations Mr. Berger had with Agents Scrafford and Branzell after he invited them into his truck and home; that is, an expectation of privacy in *voluntary conversations with law enforcement officers whom he knew were*

[10] Moreover, the Bergers will have the opportunity to litigate their state law trespass claim against CNN in the district court.

on his property to execute warrants. However, it is well established that a person has no constitutionally recognized privacy interest in conversations with law enforcement officers or agents, even where the speaker is *unaware* he is talking to one. *Lopez v. United States*, 373 U.S. 427, 438 (1963) (Where officer wore hidden microphone and was present at the invitation of the defendant, there would be no suppression of "statements made by [the defendant] to [the officer], statements which [the defendant] knew full well could be used against him by [the officer] if he wished."); *United States v. White*, 401 U.S. 745, 749 (1971) (under *Katz*, a defendant does *not* have "a justifiable and constitutionally protected expectation that [the] person with whom he is conversing will not then or later reveal the conversation"); *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("[I]t is evident that no interest legitimately protected by the Fourth Amendment is involved" where law enforcement informant "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.").

Completely disregarding such precedent, the Ninth Circuit held that "the Bergers *had* an expectation of privacy in their conversations with Agent Scrafford." Pet. App. 17a (emphasis added). Further, the court held that this privacy interest was infringed by the audio recording of the conversations. *Id.* This holding was in error, for:

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent *or by others* from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

White, 401 U.S. at 751 (emphasis added).

The basis for the Ninth Circuit's rejection of the invited informer doctrine of *Lopez*, *White*, and *Hoffa* was its conclusion that the recording of the Bergers' conversations with the agents "was not done for a legitimate law enforcement purpose." Pet. App. 15a-16a. However, as *Lopez*, *White*, and *Hoffa* demonstrate, the concern of the invited informer doctrine is the *reasonableness* of the privacy expectation, *not* the law enforcement agents' *motives*. Again, where the expectation of privacy is not reasonable in the first instance, there can be "no fourth amendment violation regardless of the nature" of the conduct. *Taketa*, 923 F.2d at 672; *accord Carter*, 119 S. Ct. at 474. The Ninth Circuit's conclusion that the subject of a search warrant has *any* reasonable privacy expectation in consensual conversations held with the serving law enforcement officers is both untenable and unprecedented.

Consequently, a subjective expectation that a consensual conversation with a law enforcement officer during the execution of a search warrant is private cannot be considered reasonable. It also is not reasonable to expect that details concerning a government search of a 75,000-acre ranch and its outbuildings for evidence of the poisoning of endangered wildlife will be kept private. The FWS agents could have searched these areas without the benefit of a warrant, as in *Dunn*,[11] and their determination to grant CNN permission to observe the search should fare no worse.

B. The Agents' Grant of Permission to CNN to Videotape the Agents' Search of the Bergers' Ranchlands and Outbuildings and the Resulting Videotaping Were Not a Fourth Amendment "Seizure."

Although the Bergers did not have a constitutionally recognized expectation of privacy in their fields and outbuildings, they claim that CNN's videotaping of those

[11] Magistrate Judge Richard W. Anderson who presided over the criminal case against Mr. Berger, specifically so held. R. 5, Ex. G.

areas—in and of itself—was an unconstitutional "seizure." A seizure occurs, however, when there is a "meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The videotaping of the Bergers on their ranch and of their fields and outbuildings did not interfere in any way with the Bergers' possession of their property. *See Arizona v. Hicks*, 480 U.S. 321, 324 (1987) ("[T]he mere recording of the serial numbers [on the suspected stolen stereo components] did not constitute a seizure. . . . In and of itself . . . it did not 'meaningfully interfere' with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure."); *Wilson v. Layne*, 141 F.3d 111, 115 (4th Cir.) (en banc) ("the reporters' photographs of the events did not amount to a seizure"), *cert. granted in part*, 119 S. Ct. 443 (1998). Finally, because CNN's presence on the Bergers' open fields did not violate the Fourth Amendment, its videotaping of what they saw also did not. *See Sallie v. North Carolina*, 587 F.2d 636, 641 (4th Cir. 1978) (where officer's presence was not proscribed by Fourth Amendment, his use of photographic equipment to record what he saw was not either); *United States v. Ludwig*, 902 F. Supp. 121, 125 (W.D. Tex. 1995) (same); *Schultz v. State*, 593 P.2d 640 (Alaska 1979) (same); *State v. Magnano*, 528 A.2d 760, 764 (Conn. 1987) (same); *Dickerson*, 313 N.W.2d at 532 (same); *People v. Maltese*, 540 N.Y.S.2d 817 (N.Y. App. Div. 1989) (same); *State v. Louis*, 672 P.2d 708, 710-11 (Or. 1983) (same); *Dubbs v. State*, 157 S.W.2d 643 (Tex. Crim. App. 1942) (same).

II. EVEN IF THE FOURTH AMENDMENT APPLIES TO THE BERGERS' FIELDS, OUTBUILDINGS, AND CONSENSUAL CONVERSATIONS WITH FWS AGENTS, THE EXPECTATION OF PRIVACY IN PREVENTING ANY INCREMENTAL STIGMA CAUSED BY PUBLICITY OF THE SEARCH SHOULD YIELD TO THE IMPORTANT LAW ENFORCEMENT INTERESTS SERVED THROUGH THE AGENTS' GRANT OF ACCESS TO CNN.

While recognizing the great value of protecting the individual's privacy in his or her home, "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Terry*, 392 U.S. at 9; *accord Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures."); *Schmerber v. California*, 384 U.S. 757, 768 (1966) ("the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner").

Consequently, the reasonablenes of an intrusion upon asserted Fourth Amendment privacy interests is examined in light of "all the circumstances." *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997); *United States v. Chadwick*, 433 U.S. 1, 9 (1977). The right of privacy asserted must be balanced against the public interest served by the challenged conduct. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.").[12] The inquiry, inherently, is fact-specific and

[12] *See also Michigan v. Summers*, 452 U.S. 692, 700-03 n.12 (1981) ("[T]he key principle of the Fourth Amendment is reasonableness—the balancing of competing interests.") (internal quotation marks and citation omitted); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) ("Reasonableness, of course, depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.") (internal quotation marks and citation omitted).

does not lend itself to absolute or rigid rules. *Harris v. United States*, 331 U.S. 145, 150 (1947). "[T]here is no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Buie*, 494 U.S. at 332 (internal quotation marks and citations omitted); *accord Terry*, 392 U.S. at 9 ("[T]he specific content and incidents of this right must be shaped by the context in which it is asserted.").

We deal here with a judicial officer's antecedent finding of probable cause to believe a crime has been committed and his authorization to law enforcement officers to exercise the inherently coercive government power to search and seize. Against this backdrop, the public interests served by the law enforcement grant of permission to journalists to witness a warrant execution are substantial: enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police. In contrast, the Bergers assert a privacy interest in preventing public scrutiny of the FWS agents' search for evidence that Mr. Berger was poisoning eagles and any resulting incremental embarrassment. Given public interests of great import to a democratic society, an asserted privacy interest which is not of constitutional magnitude, and the incremental impact of the challenged conduct on the privacy interest asserted, the Fourth Amendment balance here soundly favors access to the news media as surrogate for the public.

A. The Government Interests Served by the FWS Grant of Permission to CNN To Observe the Execution of the Warrants Are Significant.

Under the Fourth Amendment balance of interests, the Court "consider[s] first the nature and extent of the governmental interests involved." *Terry*, 392 U.S. at 22.

"The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule . . . that ignores countervailing law enforcement interests." *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (refusing to require announcement of officer's presence in all cases prior to warrant execution; reasonableness of failure to announce to be evaluated in each case). "Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration." *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967).

Here, law enforcement's grant of permission to CNN to observe the warrant execution served three essential public interests: enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police.[13] The Fourth Amendment, of course, does not preclude the accomplishment of law enforcement interests through the aid of civilians.[14] This

---

[13] The Fourth Amendment reasonableness balance is not concerned with the subjective intent of the specific law enforcement officers involved. *See Whren v. United States*, 517 U.S. 806, 814 (1996) ("[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent."); *Horton v. California*, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."); *Graham v. Connor*, 490 U.S. 386, 397 (1989) ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."); *Brower v. County of Inyo*, 489 U.S. 593, 598, 600 (1989) (refusing to inquire into subjective intent of law enforcement officers in erecting roadblock in case alleging unreasonable seizure of driver who died when he crashed into it).

[14] *See, e.g., United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (officers could bring with them telephone company employee to identify stolen telephone company property not listed in warrant); *State v. Scigliano*, 583 P.2d 893 (Ariz. 1978) (thief who sold stolen goods to defendant could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *State v. Superior Court of Marin County*, 598 P.2d 877 (Cal. 1979) (robbery victim could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *People v. Boyd*, 474 N.Y.S.2d 661 (N.Y. Sup. Ct. 1984) (burglary victim may accompany law enforcement officers in executing valid search warrant to identify stolen property); *State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (same); *Huggins v. State*, 861 P.2d 1007 (Okla. Ct. App. 1993) (thief who sold stolen goods to defendant could accompany law enforcement officers in executing valid search warrant to identify stolen property).

is equally true in circumstances where the neutrality of the civilian—here, the journalists—plays a central role in the accomplishment of the law enforcement interests. *Cf. United States v. Stegmaier*, 397 F. Supp. 611 (E.D. Pa. 1975) (Fourth Amendment not violated when officer entered hotel room in pursuit of individual suspected of stealing American Express traveler's checks while accompanied by American Express representative who, acting solely on behalf of American Express, located checks in plain view in room; checks not suppressed), *aff'd*, 538 F.2d 321 (3d Cir. 1976).

Judge Murnaghan, dissenting in *Wilson v. Layne*, submits that "if photographs had been reasonably necessary to accomplish the purpose of the warrant, . . . the police could have brought along a camera and snapped a picture themselves." 141 F.3d at 120 n.3 (Murnaghan, J., dissenting). However, it is not constitutionally unreasonable to conclude that a still or video camera operated by a neutral news media observer will effectuate the law enforcement interests in government oversight and prevention of police misconduct much more effectively than one wielded by a police officer. *See Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the

discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials . . . ."). Moreover, even as to those law enforcement interests that also might be served by a law enforcement camera crew, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973).

We address in turn the law enforcement interests served by the FWS grant of access to CNN.

1. ***Informing the Public About the Performance of Inherently Coercive Government Functions Is a Public Interest of Great Import and a Duty of Law Enforcement.***

The news media's ability to report—independently and directly, without the need to rely on law enforcement spokespersons as filters—on the government's exercise of Fourth Amendment power serves important interests accomplished through every grant of access to government action and decision-making: increased public understanding of the operation of a vital government function, public oversight of government and the criminal justice system, and promotion of the appearance of fairness.[15] It is self-evident in our "open society" that people "do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Thus, it is axiomatic that public access to information about the exercise of government powers and responsibilities is material "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the gover-

[15] The effect of media scrutiny on the accomplishment of actual fairness is addressed *infra* section II.A.3.

nors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (discussing disclosure requirement in Freedom of Information Act context).[16] Indeed,

> the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena . . . .

Richmond Newspapers, 448 U.S. at 604 (Blackmun, J., concurring). It is in the name of such First Amendment-based interests that the news media is accorded its unique role in the Constitution. "Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

The interest of the public in knowing what its law enforcement instruments are doing is accomplished, in

[16] *See also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (acknowledging value of openness of court proceedings to give "assurance that established procedures are being followed and that deviations will become known" and to enhance "basic fairness" of proceedings and "appearance of fairness so essential to public confidence in the system . . . a community therapeutic value"); *In re Oliver*, 333 U.S. 257, 270 (1948) ("The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."); *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) (Absence of public scrutiny "breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law" and, consequently, access to the workings of the criminal justice system "is essential . . . to achieve the objective of maintaining public confidence in the administration of justice.").

large measure, through direct news media access to the exercise of government power. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government . . . ."); *cf. Richmond Newspapers*, 448 U.S. at 572-73 (recognizing that journalists "function[] as surrogates for the public"). As was recently emphasized in *Reeves v. Fox Television Network*, 983 F. Supp. 703 (N.D. Ohio 1997), this is no less true in the case of law enforcement investigations. In *Reeves*, the police entered a suspect's home with his consent and accompanied by reporters who videotaped his subsequent arrest. The court rejected plaintiff's common law claims based on the videotaping and subsequent broadcast because the "facts published in the broadcast concern a matter of legitimate public concern." *Id.* at 709. "Arrests and police investigation of violent crimes are matters of legitimate public interest. . . . Clearly, the Cleveland Police Department's response to a call regarding a violent crime, their investigation and arrest of a suspect are all matters of legitimate public concern." *Id.*

The flip side of the coin is the duty of law enforcement agencies to ensure close public scrutiny of their work.

> Police agencies have a responsibility to keep the public informed of their activities, through the news media as well as through other channels. Public apathy toward the police in particular or toward government in general is usually fed by a lack of public knowledge and understanding of the functions of the police. This can be very damaging to the effectiveness of the police agency, which must rely continually upon the public for support.

Charles D. Hale, *Police Patrol* 215-16 (1981).[17] "Crime, its results, and the efforts to combat it are all matters of continuing public concern" and the "press serves the public by supplying needed information, by stimulating thought, and by providing a medium for expression." *Manual of the Los Angeles Police Department* § 420.10 (1992).

The fact that the news media and law enforcement agencies share a common institutional interest in promoting public scrutiny of law enforcement conduct—or that other law enforcement interests also are served thereby, *see infra* sections II.A.2, 3—does not make journalists *agents* of the police.[18] Rather, the law enforcement interest is served

---

[17] *See also Buckly v. Fitzsimmons*, 509 U.S. 259, 278 (1993) ("Statements to the press may be an integral part of a prosecutor's job . . . ."); *Brown v. Reno*, 584 F. Supp. 504, 505 (S.D. Fla. 1984) (State Attorney's press releases announcing the audit of a community activist's use of public funds was "well within the scope of [her] quasi-judicial function"); *Gockley v. VanHoove*, 409 F. Supp. 645, 650 (E.D. Pa. 1976) ("[I]t is within the jurisdiction of the prosecutor to release information to the public or press relating to investigations or indictments."); *Sims v. Barnes*, 689 N.E.2d 734, 736 (Ind. Ct. App. 1997) ("[T]he prosecuting attorney is duty-bound to keep the public informed as to the activities of his office. . . . [I]t is a prosecutor's duty to inform the public as to his investigative, administrative and prosecutorial activities . . . ." (internal quotation marks and citation omitted), *review denied*, 698 N.E.2d 1191 (Ind. 1998); *Oden v. Reader*, 935 S.W.2d 470, 476 (Tex. App. 1996) (prosecutor obligated to make statements to the press by statute requiring state attorneys to " 'afford the public the benefit of a free press' "; "statements to the press may be an integral part of a prosecutor's job and may serve a vital function") (quoting Tex. Code Crim. Proc. Ann. Art. 2.03(b) (Vernon 1977)); William A. Geller & Norval Morris, *Relations Between Federal and Local Police*, in 15 Modern Policing 231, 255 (Michael Tonry & Norval Morris eds. 1992) (publicity given to successful police operations "can often translate into a range of tangible benefits, including greater public cooperation with police and better fiscal support from local, state, and national funding sources").

[18] The *Berger* panel failed to recognize that, without running afoul of the Fourth Amendment, CNN's presence could accomplish

through an independent news media and, thereby, public assurance that the news media is not merely a spokesman for the government. In any event, journalists serve their function of reporting news to the public irrespective of the concurrent interests sought to be served by law enforcement agents through a grant of access.

While media access to the execution of a warrant only may be had through a grant of permission from the law enforcement agency, there also is inherent institutional antagonism between the news media and the government upon which it reports. *See Chicago Joint Bd., Amalgamated Clothing Workers v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970) ("[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation."); *Resident Participation of Denver, Inc. v. Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971) ("[T]he historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice."). The nature of the relationship between the independent news media and law enforcement is reflected in the CNN letter to A.U.S.A. McLean confirming the official grant of permission for CNN to accompany the FWS agents while explicitly reserving to CNN exclusive editorial control over the substance of its reporting.

---

the duty of the FWS agents to allow public scrutiny of their conduct *while at the same time* accomplishing CNN's mission of keeping the public informed. Pet. App. 10a-11a. ("This search stands out as one that at all times was intended to serve a major purpose other than law enforcement."; "no circuit decision has ever upheld the constitutionality of a warranted search where the broadcast media were present to document the incident for non-law enforcement purposes").

Consequently, the determination of the FWS agents to permit journalists to observe and videotape the Berger search accomplished the vital law enforcement duty of informing the public of the investigation of federal crimes against wildlife. *See Wilson v. Layne*, 141 F.3d at 118 (noting that "the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest").

2. *Informing the Public About Law Enforcement Efforts to Discover and Investigate Crime Is a Critical Tool in Deterring Future Crimes.*

Public understanding of what behavior may be criminal and public perception that criminals will be apprehended and punished is essential to effective law enforcement and is effectuated in large measure through media reports. "If a given policy is to have a deterrent effect, offenders and potential offenders need, by definition, to know what that policy is." David M. Kennedy, *Guns & Violence: Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 Val. U. L. Rev. 449, 463 (1997). Accurate communication of this information particularly is necessary where law enforcement objectives are not understood or popularly supported, as is the case with crimes against endangered wildlife in many western communities.[19]

> Public support is essential to the successful accomplishment of the police purpose. It is difficult and sometimes nearly impossible to enforce laws that are

---

[19] *See, e.g.*, R. 8/8, tape 11, page 3 (A.U.S.A. McLean explained: "The hardest part, I think—we try our cases in Montana, so our juries are selected from the West, and . . . the hardest thing you have to get over is . . ., you have to convince the jury, that, . . . this type of crime . . . deserves a conviction. A lot of them have sympathy for these ranchers because, . . . they're home-town people.").

> not popular with the majority of the people. We should recognize that a public that observes police laws and complies with regulations relieves the police of a large share of their burden. Difficult programs can be carried out with strong public and community support . . . .

Harold Barney, *Community Relations, in Some Concepts of Administrative Training* 69 (Police Management Institute 1969).[20] Correspondingly,

> for an enforcement project to get the maximum deterrence factor, the public must realize enforcement is ongoing and violators are being arrested. The high visibility of police officers in a designated area emphasizes police presence, thus increasing the public's perception of risk of arrest.

Wiliam P. Georges, *DWI Blanket Patrol: An Innovative, Effective Approach,* The Police Chief, Nov. 1992, at 56.[21]

---

[20] Public knowledge about the nature of direct interactions between law enforcement agents and the public and how agents comport themselves—particularly during the coercive exercise of Fourth Amendment power—is important to securing public support of the law enforcement mission. *See* R. Bruce Holmgren, *Primary Police Functions* 2 (1960) ("[I]n a democracy those charged with law enforcement have to win that enforcement. This means they have to win, even earn, or inspire, compliance of the public with a host of laws, ordinances and regulations. This is something voluntary. No police agency can win compliance by force. How they do it is by developing voluntary compliance. In short, you sell the people the idea that they should conform.").

[21] *See also Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (It was the duty of an IRS investigator "to inform the public about tax and other cases in which the IRS was involved in order to deter violations of the law and to instill public confidence that the IRS prosecuted violators."); Robert J. Owens, *Local Environmental Prosecutions: Coordinating Law Enforcement and Regulatory Agency Resources*, 7 Fordham Envtl. L.J. 909, 923 (1996) ("the deterrent value of a successful and publicized sting operation is inestimable" because "[i]ndividuals contemplating the commission of an environmental crime in a particular community

Providing the news media—and through the media, the public—access to criminal enforcement efforts is material to the law enforcement deterrence goal. Thus, the Ohio Court of Appeals, in rejecting the claim that the plaintiff's Fourth Amendment rights were violated by the presence of reporters and photographers at the sobriety checkpoint where he was arrested for drunk driving, explained:

> In light of the state's notable interest in raising public awareness of drunk driving as a means of ameliorating its lethal effects, the public nature of arrests and crime prevention, and the absence of any facts establishing that the media presence created a spectacle or circus atmosphere, we cannot conclude that the media's recording of lawful acts of the police rendered those acts unconstitutional.

State v. Eggleston, 671 N.E.2d 1325, 1332 (Ohio Ct. App. 1996). Furthermore, this Court's Fourth Amendment inquiry does not require eventual arrest or conviction to establish the importance of the law enforcement interest in deterrence served in the first instance by permitting the news media to observe warant executions. *See, e.g., Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding sobriety checkpoints as effective deterrent though they resulted in drunk driving arrests of

---

may change their minds" if publicity makes clear that they may be dealing with undercover officers or that their illegal actions may be videotaped); Roscoe B. Starek, III & Lynda M. Rozell, *The Federal Trade Commission's Commitment to On-Line Consumer Protection*, 15 J. Marshall J. Computer & Info. L. 679, 687 (1997) (FTC increasingly relies on highly publicized enforcement "sweeps" targeting single type of illegal activity which "results in greater publicity for law enforcement actions that, in turn, increases consumer awareness of fraud and deters fraudulent marketers"); *The Relative Merits of Unmarked vs. Marked Patrol Cars*, The Police Chief, July 1996, at 55, 56-57 ("[T]he more visible police officers are as they go about their everyday duties, the greater the opportunity to create an impression of omnipresence and the more they are likely to slow down speeders and deter both traffic and criminal violations.").

only 1% of all motorists stopped); *United States v. Martinez-Fuerte*, 428 U.S. 543, 544 (1976) (sustaining constitutionality of San Clemente checkpoint for illegal aliens when aliens were found in only 0.12% of vehicles passing through checkpoint).

The law enforcement goal of maximizing the deterrent effect of limited resources through publicity of enforcement and investigation efforts is sound. *Cf. Sitz*, 496 U.S. at 453-54 (deferring to law enforcement choices between reasonably alternative techniques because government officials "have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers"). Therefore, the government interest in "publiciz[ing] its efforts to combat . . . crime," Pet. App. 4a, served by the FWS agents' grant of permission to CNN to witness the warrant executions, merits great weight.

3. *The Presence of Reporters as Witnesses to the Execution of Warrants Reduces the Prospect of Police Misconduct and Promotes Officer Safety.*

Deterring police misconduct and protecting officer safety during the exercise of coercive government power are matters of undeniable consequence [22] and the presence of the news media also can aid in achieving these public interests. Police misconduct, for one, may occur in the absence of public oversight. As a cursory read of any newspaper will demonstrate, allegations of abuse of police power in the United States regrettably are not uncommon. In fact,

> [p]olice abuse remains one of the most serious and divisive human rights violations in the United States. The excessive use of force by police officers, including unjustified shootings, severe beatings, fatal chokings, and rough treatment, persists because overwhelming barriers to accountability make it possible for officers who commit human rights violations to escape due punishment and often to repeat their offenses.

Human Rights Watch, *Shielded From Justice: Police Brutality and Accountability in the United States* 25 (1998). Serious complaints may be dismissed by law enforcement agencies because they involve the word of a suspect against the word of the officers.[23] However, in its recent report, Human Rights Watch recognizes that "[t]he media can provide a degree of external monitoring. Extensive investigative articles and consistent reporting when abuses arise have played a central role in generating pressure for reforms." *Id.* at 61. *See, e.g., Reeves*, 983 F. Supp. at 713 n.8 (news media accompanied police officers in a consensual entry into suspect's home and videotaped subsequent arrest; suspect acknowledged later that "he

---

[22] *See, e.g., Terry*, 392 U.S. at 12 (purpose of exclusionary rule is to discourage lawless police conduct); *Knowles v. Iowa*, 119 S. Ct. 484, 487 (1998) ("We have recognized that the . . . rationale [of] officer safety [] is both legitimate and weighty.") (internal quotation marks and citation omitted).

[23] *Compare Shielded From Justice* at 323 (a police officer who eventually pled guilty to robbery, obstruction of justice and conspiracy to violate civil rights explained: "I never feared an [internal police] investigation. . . . [T]he way things were done, I mean, unless there is [sic] a whole lot of witnesses against you and a whole lot of pressure, you're not ever going to get found guilty of anything."), *and id.* 130 ("One of the officers was the subject of five brutality complaints. One complainant alleged that the officer and his partner drove him to a deserted location where the officer reportedly unzipped the man's pants and his partner grabbed the suspect's testicles and squeezed while asking questions; the officers also reportedly kicked and choked the man. Despite similar complaints by other suspects, [the Atlanta Police Department] dismissed all five complaints as unfounded because there were no witnesses other than police officers, who backed the officer.") (footnotes omitted), *with id.* at 137 ("Roderick Stewart reportedly sustained a black eye and other injuries after Atlanta police officers stopped his vehicle . . . following a two-mile chase, because they suspected he was driving under the influence of alcohol. . . . The unusual aspect of this case was that the alleged beating was videotaped by cameras mounted on the police vehicles. After viewing the tape, then-Police Chief Eldrin Bell stated, 'The tape shows excessive force was used.' ").

thought he would be better off with the camera recording the encounter").

By the same token, the presence of independent journalists may serve as a restraint on the suspect's behavior during the law enforcement encounter, *see Wilson v. Layne*, 141 F.3d at 118 ("reasonable officers may have believed that *the obvious increase to their safety afforded by the presence of the reporters* constituted a legitimate law enforcement purpose") (emphasis added), and, subsequently, prevent baseless claims of police misconduct. *Cf. Ayeni*, 35 F.3d at 688 ("The Government makes no claim that the search was being videotaped for legitimate law enforcement purposes, such as . . . to refute claims of improper conduct by the agents during the search."). As this Court recognized thirty years ago, "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Terry*, 392 U.S. at 23 (holding officer may search suspect to determine whether he is carrying weapon without probable cause). "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties." *Id.*

B. The Asserted Interest In Automatically Shielding Law Enforcement Action From Public Exposure is Anathema to Our Democratic System.

In performing the Fourth Amendment balance, the Court next must consider "the nature and quality of the intrusion on individual rights" affected by the conduct at issue. *Id.* at 24. The starting point is the context in which the plaintiff's asserted privacy expectation is claimed. *Id.* at 9. Here, that is the execution of a search warrant, not a private event. As a matter of fact, searches commonly are highly visible exercises of government authority. *See, e.g., United States v. Spikes*, 158 F.3d 913, 927 (6th Cir. 1998) (referring to execution of warrant as "spectator sport" where SWAT team captain used bullhorn to announce that police were executing warrant, members of SWAT team shouted same message as they charged front porch, and "neighbors had already exited their homes to observe the execution of the warrant before the police made their entry into the residence").[24]

It is in the context of this exercise of government authority that the Bergers claim an interest in preventing news media access that may lead to publicity about the facts surrounding the officers' execution of the warrants

---

[24] *See also* Shannon McCaffrey, *Man Linked to Eight Killings*, Associated Press Online, Sept. 3, 1998 (crowd of 100 people watched police remove three dead bodies from home during execution of search warrant in New York); Bruno Tedeschi & David Voreacos, *Chemical Site Raided: Agents Seize Substances, Documents*, Bergen County Record, July 22, 1998, at A1 (nearby residents looked on as government agents arrived in 25 vehicles, sealed off the avenue with police barricades, and executed search warrant on chemical company in New Jersey); Leanora Minai, *Police Say They Were Rready This Time*, St. Petersburg Times, Apr. 25, 1998, at 1B (crowd of 20 to 30 gathered in street as 15 to 20 undercover narcotics detectives executed search warrant at alleged crack house in predominantly African-American Florida neighborhood); Kim Williams-Neil, *4 Men Arrested in Drug Raid*, Montgomery Advertiser, Jan. 31, 1998, at 1C (crowds of onlookers watched as officers swarmed around Alabama house to execute search warrant for narcotics and masked officers formed human barriers to prevent vehicular and pedestrian traffic on street); Terri Somers & Stephanie Hoo, *2 Policeman, Civilian Shot in City*, Asbury *Park Press*, Nov. 9, 1997, at 1 (crowds gathered behind trees and on porches up and down avenue when police exchanged gunfire with residents of suspected drug house during execution of search warrant in New Jersey); Judith Gaines & David Armstrong, *Police Say They're Close to Finding Woman; DA 'Pessimistic' Missing Reading Nurse Is Still Alive*, The Boston Globe, Oct. 18, 1997, at B1 (police armed with shovels and dogs executed search warrant in house and nearby woods, drawing crowd at 6 a.m.); Keven Simpson, *'Crackhouse' Raid Yields Four Arrests in Bloomington; Apartment Filthy, Children Go Into Protective Custody*, Bloomington Pantagraph, Oct. 4, 1997, at A6 (commotion and flashing police lights brought many neighbors to their windows or curbs during execution of search warrant at Illinois drug house).

and in preventing any resulting incremental embarrassment.[25] However, in the circumstances presented, the subjective privacy expectation asserted is not an interest meriting *constitutional* recognition or protection.[26]

The Court's opinion in *Paul v. Davis*, 424 U.S. 693 (1976), is instructive in this regard. Edward Davis was arrested in Louisville, Kentucky in 1971 on a charge of shoplifting. He pled not guilty and the charge was filed with leave to reinstate, leaving it outstanding. *Id.* at 695-96. In late 1972, Chief Paul of the Louisville Police Department distributed flyers to local merchants warning about active shoplifters in the area. Davis' name and photograph were included on the flyer. He alleged in a suit pursuant to 42 U.S.C. § 1983 that Paul defamed him in violation of the Fourtenth Amendment. The Court rejected his argument that he was deprived of a "liberty" interest protected by the Due Process Clause. *Paul*, 424 U.S. at 712. Davis further argued that Paul deprived him of a " 'right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendment.' " *Id.* The Court also rejected this contention, explaining:

> He claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead

[25] *See, e.g.*, J.A. 54 ¶ 40 ("CNN planned to use the . . . Bergers to illustrate these acts, casting them unwittingly in the role of inhumane barbarians for the purposes of broadcasting a derogatory portrayal for all the world to see."); *id.* at 64 ¶ 85 ("plaintiffs have suffered extreme distress, humiliation, anguish and embarrassment"); *id.* at 68 ¶ 105 ("plaintiffs suffered extreme indignities and humiliation[,] . . . loss of standing in the community, and have been held up to ridicule before their peers").

[26] This is not to say that legislative or common law may not afford the Bergers a remedy or proscribe the permission granted to CNN in this case by the FWS agents. *See infra* n.30.

> on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713.[27]

Similarly, in *Siegert v. Gilley*, 500 U.S. 226 (1991), this Court rejected a government employee's *Bivens*[28] claim based on defamatory statements made by his former federal employer to his current employer. Siegert alleged the defamation infringed his "liberty" interests in violation of the Fifth Amendment's Due Process Clause. Reiterating its holding in *Paul*, the Court spelled out that "[d]efamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation" despite serious impairment of Siegert's future employment opportunities. *Id.* at 233, 234. "[S]o long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a Bivens action." *Id.* at 234.

The principle that the United States Constitution simply does not protect against injury to reputation alone rings all the more true when the alleged injury results from publicity about public law enforcement actions taken against an individual based on a judicial determination of probable cause to believe that evidence of a crime or a suspect will be found. *Hicks v. Cassilly*, 971 F. Supp. 956, 970 (D. Md. 1997) (rejecting plaintiffs' claims that law enforcement officers violated a constitutional right to privacy "by permitting the news media to videotape and

[27] The search of the Bergers' ranch resulted in the filing of criminal charges against Mr. Berger for violation of a federal law governing the use of pesticides, and, eventually, in his conviction. However, irrespective of a subsequent arrest or prosecution, publicity about the execution of the warrant—itself "an official act," *Paul*, 424 U.S. at 713—should not provide the basis for a constitutional claim of reputational injury.

[28] 403 U.S. 388.

photograph them [during the execution of a warrant in a bookstore], thereby causing their likenesses to be published openly to the general public" because "claims for injury to reputation do not rise to the level of constitutional torts and are not compensable under 42 U.S.C. § 1983"), *rev'd on other grounds*, 153 F.3d 720 (4th Cir. 1998); *accord Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620, 1622 (N.D. Ohio 1984) (where news media took pictures during execution of warrant in home, court held that "absent the Moncriefs' showing something more than mere embarrassment caused by the photographs, no federally protected right or privilege has been violated"). The Fourth Amendment protects against unwarranted government intrusion, not *publicity* about warranted intrusion. *Moncrief*, 10 Media L Rep. at 1622 (The Constitution does not protect any interest in being free from unwanted publicity. "The right to be free from unwanted publicity . . . is protected, if at all, by the common law . . . .") (internal quotation marks and citation omitted).

Further, to the degree the Bergers allege a privacy interest which was invaded by the reporters' *presence* during the execution of the warrants, the incremental impact of having twenty-four people (including three journalists) instead of twenty-one (the FWS warrant execution team) witness the execution of the warrant, R. 8/7 at 27, should not impact the constitutional balance. In other words, the incremental harm of having three civilians observing what twenty-one law enforcement officers already are viewing does not outweigh the significant public interests served by the presence of neutral journalists. *Summers*, 452 U.S. at 696, 701-03 (Fourth Amendment not violated by detention without probable cause of resident during execution of search warrant since detention "was surely less intrusive than the search itself" and it "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant").

C. The Fourth Amendment Balance Weighs in Favor of Public Access Here.

"[I]n determining reasonableness, [the Court] balance[s] the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Buie*, 494 U.S. at 331 (citations omitted). Here, given an asserted privacy interest not of constitutional magnitude, vital public interests, and only incremental impact on the asserted privacy concern,[29] the Fourth Amendment balance weighs strongly in favor of the public interest.[30]

---

[29] While there may be situations where the presence of the news media during the exercise of Fourth Amendment authority unduly infringes on a particularized privacy interest which outweighs the public and law enforcement interests being served by the news media's presence, the Fourth Amendment should not countenance a *per se* prohibition on a law enforcement agent's determination from case to case that the public interest will be served by the presence of a neutral journalist, as was the case here. CNN does not argue, for example, that law enforcement interests would override the privacy interests impacted during a strip or body cavity search. *See Wilson v. Layne*, 141 F.3d at 129 (Murnaghan, J., dissenting). Nor, for that matter, doe CNN suggest that it could have *conducted*—as opposed to having *observed*—a search or seizure of the Bergers' property. In contrast, the Fourth Amendment question accepted for review in this case does not necessarily presuppose entry onto private property and, consequently, would include, for example, the execution of an arrest warrant on public property where the suspect's privacy rights would be at the nadir. As always is the case when determining reasonableness under the Fourth Amendment, the context is critical and hard-and-fast rules are eschewed. *Harris*, 331 U.S. at 150; *Buie*, 494 U.S. at 332.

[30] The outcome of the Fourth Amendment inquiry does not require that federal judges seek to "encourage or condone" the law enforcement conduct at issue. *See United States v. Appelquist*, 145 F.3d 976, 979 (8th Cir. 1998) (holding that bringing journalists on private property immediately following search to videotape seized drugs does not violate Fourth Amendment while acknowledging that court does not "encourage or condone such conduct"). The constitutional equation, of course, does not preclude legislative or common law schemes proscribing behavior which satisfies the rea-

On one side of the scale is the privacy interest claimed by the Bergers and the impact of the government's conduct on such interest. They assert a privacy interest in preventing public disclosure and media observation of the otherwise reasonable execution of valid warrants. However, this interest is asserted in the wake of an inherently substantial invasion of privacy authorized by a judicial officer's determination that probable cause existed to believe Mr. Berger was illegally killing endangered wildlife. *Summers*, 452 U.S. at 701 ("Of prime importance in assessing the intrusion is the fact that the police had obtained a warrant to search respondent's house for contraband. A neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there."). Moreover, the Bergers do not allege that the FWS agents' search, itself, exceeded the scope of the warrant, nor that CNN influenced the agents to exceed its scope. *See People v. Boyd*, 474 N.Y.S.2d at 665 (in holding Fourth Amendment not violated by police bringing along robbery victim during execution of search warrant, court noted that "[n]o word or action on [the victim's] part induced the police to extend

sonableness balancing test of the Fourth Amendment and, in fact, the Bergers have alleged trespass and intentional infliction of emotional distress claims that remain to be adjudicated and are not here at issue. J.A. 45-46 ¶ 4. *See Avenson v. Zegart*, 577 F. Supp. 958, 962 n.5 (D. Minn. 1984) (Rejecting plaintiffs' constitutional claim based on a media ride-along, the court noted that "[p]laintiffs have adequate remedies available in . . . their state law tort theories to recover any losses they might have incurred."); *Monerief*, 10 Media L. Rep. at 1621 ("Rights, privileges, and immunities not derived from the federal constitution or secured thereby are left exclusively to the protection of the states."). By the same token, the existence of tort remedies has no bearing on the Fourth Amendment determination. *Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir. 1995) ("whether [the private party] was a trespasser under state law was not . . . relevant [] to [plaintiff's] claim of a constitutional violation under 42 U.S.C. §§ 1983, 1985, or 1986.").

the hunt beyond the area or the scope authorized by the issuing magistrate").

Consequently, the Bergers assert a privacy interest in governmental conduct which, inherently, is not private.[31] The stigma or embarrassment associated with being the target of a warrant—while no doubt genuine—is inherent in the warrant process, *cf. Terry*, 392 U.S. at 25 (frisk "surely" is an "annoying, frightening, and perhaps humiliating experience"), and any effect on reputational concerns caused here by allowing direct news media access to the officers' execution of the warrants merely was incremental. *See Summers*, 452 U.S. at 701, 703 ("The detention of one of the residents while the premises were searched, although admittedly a significant restraint on his liberty, was surely less intrusive than the search itself" and it "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant."); *Scigliano*, 583 P.2d at 896 ("where a valid search warrant has been acquired and was being lawfully executed, we see no greater intrusion into personal security and privacy, and hence no constitutional prohibition, in the use of the informant at the scene of the execution of the warrant"); *People v. Boyd*, 474 N.Y.S.2d at 665 (presence of victim who identified stolen property during police execution of search warrant "constituted no greater intrusion on defendants' privacy than that which had already been authorized by the issuance of the warrant").

On the other side of the Fourth Amendment scale are the interests served by the incremental intrusion on whatever

[31] In fact, the detailed affidavit in support of probable cause setting forth the basis for obtaining the warrant in the first place, the warrant itself, and the return on the warrant identifying information seized became a matter of public record one and a half weeks after the warrant was executed (and 6 months before CNN broadcast any coverage of the search). J.A. 27, 35, 43, 68 ¶ 82; R. 8/3-4.

privacy expectation the Bergers may have.[32] Here, the law enforcement interests in enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police are considerable as they facilitate important institutional law enforcement duties that extend beyond the specifics of any individual search.[33] As the vast Fourth Amendment jurisprudence of this Court makes evident, interests besides just locating evidence of crime and apprehending suspects warrant exercise of the government's Fourth Amendment power.[34]

---

32 As discussed in section I, *supra*, any privacy expectation the Bergers have in their open fields and in their consensual conversations with law enforcement officers is not constitutionally reasonable.

33 CNN does not suggest here that the interest of the public in knowing about the exercise of government power necessarily would tip the Fourth Amendment balance in favor of permitting a non-media observer to accompany law enforcement officers. Implicit in the Fourth Amendment reasonableness standard is some consideration of the effectiveness of the intrusive behavior in accomplishing the legitimate law enforcement interests. *See, e.g., Brown v. Texas*, 448 U.S. 47, 51 (1979) (describing measure of effectiveness as "the degree to which the seizure advances the public interest"); *but see Sitz*, 496 U.S. at 455 (stating that Brown's effectiveness rule does not deny law enforcement officials discretion to choose among reasonable, not necessarily most effective, alternatives). The public information interest can often be served more effectively through a grant of access to journalists.

34 *See, e.g., Buie*, 494 U.S. at 337 (concerns over officer safety authorized protective sweep of parts of house after arrest on less than probable cause); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668-74 (1989) (public's interest in deterring drug use and drug smuggling authorized mandatory drug testing of Customs Officers prior to promotion for positions involving drug interdiction and carrying of firearms); *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989) (concerns for public safety authorized warrantless alcohol and drug tests of railroad employees); *New Jersey v. T.L.O.*, 469 U.S. at 339 (interest in maintaining discipline in classroom and on school grounds justified warrantless search of purse of student caught smoking in bathroom); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975) (concerns about enforcing immigration laws due to the economic and social ramifications of illegal immigration authorized stop of vehicles near border on less than probable cause); *United States v. Biswell*, 406 U.S. 311, 315-16 (1972) (concerns about preventing sales of guns to undesirable persons authorized warrantless inspections of gun dealers); *Wyman v. James*, 400 U.S. 309, 318-19 (1971) (concerns about monitoring child welfare and living conditions authorized warrantless home visit by caseworker to recipient of AFDC); *Terry*, 392 U.S. at 28, 29 (concerns over officer safety authorized stop and frisk based on less than probable cause).

In particular, the Court has acknowledged the reasonableness of measures designed to deter criminal conduct regardless of whether the measures are the most effective means of capturing evidence of a crime. For example, in *Sitz*, the law enforcement officers acknowledged that their main purpose in initiating a suspicionless sobriety checkpoint was to deter drivers from drinking and driving, *not* to increase drunk driving arrests. Nonetheless, the Court upheld use of the checkpoints as reasonable under the Fourth Amendment because of the strong public interest in detering drunk driving and drunk driving accidents. 496 U.S. at 455.[35] Nevertheless, the Ninth Circuit appears to have erroneously assumed that law enforcement interests outside searching for evidence and seizing suspects are not recognized by the Fourth Amendment. Pet. App. 4a (recognizing, but rejecting, fact that "the government wanted to publicize its efforts to combat environmental crime").

Moreover, the fact that CNN, like most members of the news media, is a for-profit entity is immaterial; surely, whether the media observer is CNN or a public television station should have no bearing whatsoever on the constitutional balance struck. Consequently, the preoccupation of

---

35 *See also Griffin v. Wisconsin*, 483 U.S. 868, 875, 880 (1987) (upholding warrantless search of probationer's residence by probation officer to deter probationer from recidivism); *New York v. Burger*, 482 U.S. 691, 708-10 (1987) (upholding warrantless inspections of auto junkyards to deter junkyards from becoming markets for stolen autos and parts).

the *Berger* panel and the dissenting judges in *Wilson v. Layne* with the for-profit status of CNN and the *Washington Post*,[36] respectively, was improper, and disregarded well-settled law. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) ("That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment" and there is no reason "why operation for profit should have any different effect in the case of motion pictures."); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) ("If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from New York Times to Hustler Magazine would be little more than empty vessels.") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)).

Finally, in considering the law enforcement interests advanced by conduct during the execution of a warrant, this Court has deferred in significant measure "to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant." *Dalia v. United States*, 441 U.S. 238, 239 (1979) (finding covert entrance to install sur-

[36] Pet. App. 9a (search was a "commercial television/law enforcement enterprise"); *id.* at 9a-10a (purpose of search was for officials to "assist in the media obtaining material for their commercial programming"); *id.* at 16a ("Here, law enforcement authority was used to assist commercial television, not to further law enforcement objectives."); *Wilson v. Layne*, 141 F.3d at 119 (Murnaghan, J., dissenting) (Fourth Amendment violated when officers "invited newspaper reporters to enter a private home and photograph the residents for purely commercial newspaper purposes"); *id.* at 123 ("the media presence here served no legitimate law enforcement function, but rather was intended solely to gather news to profit the *Washington Post*"); *id.* ("A warrant does not carry with it the authority to bring along mere bystanders to observe for their own commercial purposes."); *id.* at 132 ("These reporters were in the Wilsons' home strictly for their own commercial newsgathering purposes.").

veillance device pursuant to surveillance order reasonable despite lack of specific authorization in warrant to covertly enter premises).

> Often in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant. . . . It would extend the Warrant Clause to the extreme to require that, whenever it is reasonably likely that Fourth Amendment rights may be affected in more than one way, the court must set forth precisely the procedures to be followed by the executing officers.

Id. at 258. Thus, the Sixth Circuit has held that the Fourth Amendment was not violated by law enforcement officers who, during the execution of a search warrant listing only an electronic device, brought with them a telephone company employee to identify telephone company property not listed in the warrant which the officers suspected—but did not have probable cause to believe—they would find on the premises. *Clouston*, 623 F.2d 485, 486-87.[37] Other courts have approved the decision of police officers bringing a civilian along to help identify stolen property despite the fact that the warrant executed did not authorize the civilian's presence. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996) (where warrant specifically authorized "videotaping and photographing," Fourth Amendment not violated by media filming

[37] *Accord Scigliano*, 583 P.2d 893 (thief who sold stolen goods to defendant could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *Superior Court of Marin County*, 598 P.2d 877 (robbery victim could accompany law enforcement officers in executing valid search warrant to identify stolen property not listed in warrant but present in plain view); *Huggins*, 861 P.2d 1007 (Fourth Amendment not violated where officers procured warrant listing items identified by informant and brought informant along during search to identify items not listed in warrant).

search "even though the warrant said nothing about a television crew"); *People v. Boyd*, 474 N.Y.S.2d at 664.[38]

Fundamentally, the substantial public interests in enabling public oversight of law enforcement, deterring crime, and curbing potential police misconduct and danger to police—each advanced by the FWS grant of permission to CNN to witness the execution of the warrants [39]—must yield to any incremental harm the Bergers suffered beyond that which is inherent in the significant intrusion on privacy permitted by the warrants. *See Buie*, 494 U.S. at 334 (even where intrusion is not "de minimis," the privacy interest must yield to important law enforcement interest). Simply put, society should not be prepared to recognize as constitutionally reasonable an expectation that the details surrounding the execution of the warrants on the Bergers' ranch be kept hidden from public view. Government execution of a warrant is not a private event, and the reasonable determination of the FWS that journalists may witness this event does not violate the Fourth Amendment.

[38] The presence at a search of non-law enforcement personnel who served some value to law enforcement has been upheld as reasonable with no consideration of whether the private party was mentioned in the warrant. *See, e.g., United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *Clouston*, 623 F.2d at 486-87; *Scigliano*, 583 P.2d at 895; *Superior Court of Marin County*, 598 P.2d at 878; *Huggins*, 861 P.2d at 1009; *Commonwealth v. Farrar*, 413 A.2d 1094 (Pa. 1979).

[39] The *Berger* panel placed great emphasis on the fact that CNN and the law enforcement agents reduced to writing the agents' grant of permission to CNN to observe the execution of the warrant. Pet. App. 9a-10a ("This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming."); *id.* at 12a (in none of the previous cases "did law enforcement officials engage in conduct approaching the planning, cooperation and assistance to the media that occurred in this case."). However, journalists *never* can observe the execution of a search warrant without the express agreement of the searching officers. The fact that the consent here was reduced to writing is of no consequence and does not distinguish this case from others where "ride alongs" were held not to violate any constitutional rights. *See, e.g., Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) ("We are unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness."); *Higbee v. Times-Advocate*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. 1980); *Moncrief*, 10 Media L. Rep. at 1620.

CONCLUSION

For the foregoing reasons, the CNN Respondents respectfully request that this Court reverse the decision of the Ninth Circuit and hold that Petitioners did not violate the Fourth Amendment by permitting journalists to observe the otherwise reasonable execution of valid warrants.

Respectfully submitted,

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK, INC.
One CNN Center
P.O. Box 105366
Atlanta, GA 30348-5366

P. CAMERON DEVORE *
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC M. STAHL
DAVID BOWMAN
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
(206) 622-3150
Counsel for Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann

* Counsel of Record

(10)

No. 97-1927

Supreme Court, U.S.
FILED
JAN 27 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS PAUL W. BERGER AND ERMA R. BERGER

HENRY H. ROSSBACHER*

NANCI E. NISHIMURA
TRACY W. YOUNG
DAVID F. DESMOND
MY T. HUYNH
ROSSBACHER & ASSOCIATES
Citibank Center
444 South Flower Street,
Suite 2100
Los Angeles, California
90071-2922
(213) 895-6500

JAY F. LANSING
MOSES LAW FIRM
The Terrace – Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103
(406) 248-7702

*Counsel of Record

Counsel for Respondents

BEST AVAILABLE COPY

61PP

TABLE OF CONTENTS

Page

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. Factual Background 3

B. The District Court Proceedings 8

C. The Decision By The Court of Appeals 9

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. LAW ENFORCEMENT VIOLATES THE FOURTH AMENDMENT BY ALLOWING THE MEDIA TO JOIN THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY AND TO VIDEOTAPE AND RECORD THE SEARCH FOR PRIVATE PURPOSES AND NOT IN AID OF ANY LAW ENFORCEMENT EFFORT 12

A. Privacy Is The Core Value Of The Fourth Amendment 12

1. The Sanctity Of The Home Is Inviolable ... 13

2. Expectations Of Privacy Are Protected... 14

B. The Fourth Amendment Is Violated When Law Enforcement Exceeds The Clearly Established Constitutional Limitations Of The Search Warrant Requirement 15

TABLE OF CONTENTS – Continued

Page

1. A Search Warrant Is An Express Limitation On Law Enforcement Authority To Conduct A Search 15

2. The Agents Exceeded The Limitations Of The Search Warrant Without Authority... 20

   a. The Search Warrant Did Not Expressly Authorize The Media's Presence 20

   b. Videotaping And Recording By The Media For Private Purposes Was A Search And Seizure That Did Not Serve Law Enforcement Purposes.... 21

   c. Assisting The Media To Videotape And Record The Search Was Beyond The Scope And Authority Of The Search Warrant And Unreasonable 23

3. The Bergers Did Not Grant Consent: The Agents Entered The Bergers' Home Pursuant To Their False Claim That The Court Ordered The Search Of Every Building On The Ranch 28

4. There Was No Exigency To The Search To Imply Any Justification For The Agents' Entry Into The Bergers' Home With The Media..... 30

5. The Plain View Doctrine Does Not Validate The Media's Private Search 31

TABLE OF CONTENTS – Continued

Page

6. Allowing The Media To Videotape And Record At The Berger Ranch Converted The Search Into An Exploratory Search And The Particularized Warrant Issued Here Into A General Warrant And A Writ Of Assistance..... 33

II. QUALIFIED IMMUNITY DOES NOT SHIELD LAW ENFORCEMENT FROM LIABILITY FOR VIOLATING CLEARLY ESTABLISHED FOURTH AMENDMENT LAW BY ALLOWING THE MEDIA TO ENTER, OBSERVE, VIDEOTAPE AND RECORD THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY 35

   A. The Qualified Immunity Standard 35

   B. Fourth Amendment Rights Were Violated 36

   C. Fourth Amendment Rights Were Clearly Established..... 39

      1. The Agents Violated Clearly Established Fourth Amendment Rights 43

      2. The Agents Violated Explicit Federal Statutes Embodying The Constitutional Prohibition Limiting Their Authority To Execute Search Warrants 45

   D. Damages Are Appropriate For Constitutional Violations..... 48

CONCLUSION 50

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abel v. United States, 362 U.S. 217 (1960) 2, 16, 20

Albright v. Oliver, 510 U.S. 266 (1994) 50

Alderman v. United States, 394 U.S. 165 (1969) 24, 25

Anderson v. Creighton, 483 U.S. 635 (1987) 35, 40, 42

Andresen v. Maryland, 427 U.S. 463 (1976) 16, 20

Arizona v. Hicks, 480 U.S. 321 (1987) 31

Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984) 45

Ayeni v. CBS Inc., 848 F. Supp. 362 (E.D.N.Y. 1994) 36, 43, 45, 46, 47

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994) ..... *passim*

Baker v. Howard, 419 F.2d 376 (9th Cir. 1969) 39

Bell v. Hood, 327 U.S. 678 (1946) 50

Berger v. New York, 388 U.S. 41 (1967) 22, 24, 27, 34

Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) 39

Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) 38, 44

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) ..... *passim*

Bouie v. City of Columbia, 378 U.S. 347 (1964) 41

Boyd v. United States, 116 U.S. 616 (1886) 12, 16, 28

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 35

Bumper v. North Carolina, 391 U.S. 543 (1968) 23, 29

TABLE OF AUTHORITIES – Continued

Page

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 9, 10, 37, 38, 44

Buonocore v. Harris, 134 F.3d 245 (4th Cir. 1998) 38, 44

Burns v. Reed, 500 U.S. 478 (1991) 35

Butz v. Economou, 438 U.S. 478 (1978) 49

Chimel v. California, 395 U.S. 752 (1969) 18

City of West Covina v. Perkins, No. 97-1230, 1999 U.S. LEXIS 507, *20 (Jan. 13, 1999) 50

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 16, 31, 32, 33

County of Sacramento v. Lewis, 118 S.Ct. 1708 (1998) 35

Dalia v. United States, 441 U.S. 238 (1979) 17

Elder v. Holloway, 510 U.S. 516 (1994) 42, 45

Elkins v. United States, 364 U.S. 206 (1960) 12, 49

Fox v. Acadia State Bank, 937 F.2d 1566 (11th Cir. 1991) 45

Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 18

Gomez v. Toledo, 446 U.S. 635 (1980) 35

Gouled v. United States, 255 U.S. 298 (1921) 13, 22

Graham v. Connor, 490 U.S. 386 (1989) 18, 50

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 10, 35, 39, 42, 49

Higbee v. Times-Advocate, Inc., 5 Media L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) 10, 45

TABLE OF AUTHORITIES – Continued

Page

Hoffa v. United States, 385 U.S. 293 (1966) 22, 27
Horton v. California, 496 U.S. 128 (1990).....15, 32, 34
Illinois v. Rodriguez, 497 U.S. 177 (1990)..... 31
Irvine v. California, 347 U.S. 128 (1954)..... 25
Johnson v. United States, 333 U.S. 10 (1948).....14, 16
Jones v. United States, 357 U.S. 493 (1958)..... 18
Kalina v. Fletcher, 118 S.Ct. 502 (1997) 35
Katz v. United States, 389 U.S. 347 (1967) ..... *passim*
Ker v. California, 374 U.S. 23 (1963)..... 18
Lopez v. United States, 373 U.S. 427 (1963)..... 27
Mapp v. Ohio, 367 U.S. 643 (1961).....17, 20
Marron v. United States, 275 U.S. 192 (1927) 16, 17, 18, 21
Maryland v. Buie, 494 U.S. 325 (1990)..... 16
Maryland v. Garrison, 480 U.S. 79 (1987)..... 17
McBoyle v. United States, 283 U.S. 25 (1931) 41
McDonald v. United States, 335 U.S. 451 (1948)....14, 18
Michigan v. Clifford, 464 U.S. 287 (1984)..... 30
Michigan v. Summers, 452 U.S. 692 (1981)..... 22
Mitchell v. Forsyth, 472 U.S. 511 (1985) 40, 42, 44
Moncrief v. Hanton, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984).....10, 45
On Lee v. United States, 343 U.S. 747 (1952) 27
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) 38

TABLE OF AUTHORITIES – Continued

Page

Parker v. Clarke, 905 F. Supp. 638 (E.D. Mo. 1995) 38
Payton v. New York, 445 U.S. 573 (1980) .. 14, 22, 33, 34
Procunier v. Navarette, 434 U.S. 555 (1978)..... 42
Roe v. Wade, 410 U.S. 113 (1973) 45
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 28
Screws v. United States, 325 U.S. 91 (1945) 40, 41, 43
Sgro v. United States, 287 U.S. 206 (1932) 16
Siegert v. Gilley, 500 U.S. 226 (1991)..... 35
Silverman v. United States, 365 U.S. 505 (1961) ... *passim*
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)..... 13
Soldal v. Cook County, Ill., 506 U.S. 56 (1992).....13, 45
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996)..... 44
Stanley v. Georgia, 394 U.S. 557 (1969)..... 34
Steagald v. United States, 451 U.S. 204 (1981) 33
Swate v. Taylor, 12 F. Supp.2d 591 (S.D. Tex. 1998) 46
The Florida Star v. B.J.F., 491 U.S. 524 (1989)..... 39
United States v. Caceres, 440 U.S. 741 (1979)..... 27
United States v. Gambino, 734 F. Supp. 1084 (S.D.N.Y. 1990) 47
United States v. Jacobsen, 466 U.S. 109 (1984)..... 14
United States v. Lanier, 117 S.Ct. 1219 (1997) 40, 41, 42, 43
United States v. Lefkowitz, 285 U.S. 452 (1932)..... 16
United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 14

TABLE OF AUTHORITIES – Continued

Page

United States v. On Lee, 193 F.2d 306 (2d Cir. 1951) 12, 22, 27

United States v. Peifer, 474 F. Supp. 498 (E.D. Pa. 1979) 47

United States v. Place, 462 U.S. 696 (1983) 18

United States v. Rabinowitz, 339 U.S. 56 (1950) 18, 20, 34

United States v. Sanchez, 509 F.2d 886 (6th Cir. 1975) .. 47, 48

United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992) 37, 49

United States v. Schwimmer, 692 F. Supp. 119 (E.D.N.Y. 1988) 47

United States v. United States District Court, 407 U.S. 297 (1972) 13, 16, 46

United States v. Warren, 550 F.2d 219 (5th Cir. 1977) 48

United States v. White, 401 U.S. 745 (1971) 22, 24, 26, 27

United States v. Wright, 667 F.2d 793 (9th Cir. 1982) 47

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 38

Walter v. United States, 447 U.S. 649 (1980) 34

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) 13

Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) 36

Winston v. Lee, 470 U.S. 753 (1985) 13, 45

Wong Sun v. United States, 371 U.S. 471 (1963) ... 16, 20, 24

Woodward v. Worland, 977 F.2d 1392 (10th Cir. 1992) 45

York v. Story, 324 F.2d 450 (9th Cir. 1963) 39

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIX 30, 39

Code of Federal Regulations, Title 28 §50.2(b)(1)-(6) 48

Federal Rules of Criminal Procedure Rule 41 47

Ninth Circuit local rule 30-1.5 3

United States Code, Title 5 §552a 48

United States Code, Title 18

§241 42

§242 ..... 40, 41, 42

§2231 28

§2234 ..... 19, 47

§2236 ..... 19, 47

United States Code, Title 18

§§2510, *et seq* 8

§3105 ..... *passim*

§3109 47

United States Code, Title 42

§1983 ..... 19, 42, 44

The Espionage Act, Title XI, §7, 40 Stat. 217, 229 (1917) (repealed 1948) 46

The National Prohibition Act, Title II, §2, 41 Stat. 305, 308 (1919) 46

TABLE OF AUTHORITIES – Continued

Page

FOREIGN JURISDICTION

Entick v. Carrington, 19 Howell's State Trials 1029 (K.B. 1765) 12

STATE CASES

Anderson v. WROC-TV, 441 N.Y.S.2d 220 (N.Y. Sup. Ct. 1981) 31, 44

Bell v. Clapp, 10 Johns. 263 (N.Y. Sup. Ct. 1813) 2

Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977) 30

Magenis v. Fisher Broadcasting, Inc., 798 P.2d 1106 (Or. Ct. App. 1990) 31

Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463 (1986) 30

Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980) 31, 45

Rogers v. Buckel, 615 N.E.2d 669 (Ohio Ct. App. 1992) 31

Scott v. Florida, 559 So.2d 269 (Fla. Dist. Ct. App. – 1990) 31

STATUTES

MISCELLANEOUS

3 Charles Alan Wright, *Federal Practice and Procedure: Criminal* §661 (2d ed. 1982) 19

Department of Justice Manual, 1-7.001 at 1-285 (1990-1 Supp.) 48

TABLE OF AUTHORITIES – Continued

Page

N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, 100 n.77 (1937) 36

H.H. Rossbacher, T.W. Young, & N.E. Nishimura, *An Invasion Of Privacy: The Media's Involvement In Law Enforcement Activities*, 6 Journal of Financial Crime (Henry Stewart, London, 1998) 49

Heinke & Edelman, *Police and Emergency "Ride-Alongs" – Is Viewer Excitement Worth the Risk?* 8 ENT. L. REP. 3 (1995) 49

BRIEF FOR RESPONDENTS PAUL W. BERGER AND ERMA R. BERGER

Respondents Paul W. Berger and Erma R. Berger (the "Bergers") respectfully respond to the Petition on Writ of Certiorari by Petitioners, Special Agents of the United States Fish and Wildlife Service ("FWS") Rodney C. Hanlon ("Hanlon"), Joel Scrafford ("Scrafford"), Richard C. Branzell ("Branzell") and Robert Prieksat ("Prieksat"); and Assistant United States Attorney Kris A. McLean ("AUSA McLean") (collectively the "Government Agents").[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth Amendment to the United States Constitution, which provides that,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Section 3105 of Title 18 of the United States Code also applies in this case and provides that,

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. §3105.

---

[1] Parties to this action also include Turner Broadcasting System, Inc. ("Turner"), Cable News Network, Inc. ("CNN"), CNN correspondent Jack Hamann ("Hamann"), Robert Rainey ("Rainey"), and Donald Hooper ("Hooper") (collectively the "Media"). Their separate Petition for a Writ of Certiorari is pending.

INTRODUCTION

When the Fourth Amendment to the United States Constitution was adopted by the First Congress in 1789, the Framers of the Constitution and the Amendments could not anticipate the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."[2] The Framers knew from bitter experience the evils of life unprotected from officers of the central government and private citizens armed with general warrants and writs of assistance. In recognition of the fact that this is a nation of individual liberty, the Fourth Amendment was thus directed at providing the greatest restraint upon the government's intrusion into privacy.[3] The Fourth Amendment was demanded as an indispensable check which "the constitution of the United States, [has] imposed upon the operation of these search warrants, and with the manifestation of a strong jealousy of the abuses incident to them. . . . "[4]

Before this Court is the claim that the Fourth Amendment does not prohibit government agents bringing private persons – the Media – into private homes if a purpose of their presence is to allow observation and recording of the agents' activities in execution of a warrant. The warrant authorized by the Fourth Amendment is transformed from a limited license granted only to law enforcement officers restricted, not only as to the persons and places to be searched, but also as to the persons and things to be seized – into a *writ of assistance* for the press to obtain observations and recordings of private places, persons and occurrences, papers and property – and a *general warrant* sanctioning the observation and recording by the press of the place searched, the person and things seized, the personal indignities incident thereto and anything else the press may find of interest. The claim is that this government action is reasonable and that the people

[2] *Silverman v. United States*, 365 U.S. 505, 509 (1961).

[3] *Abel v. United States*, 362 U.S. 217, 237 (1960).

[4] *Bell v. Clapp*, 10 Johns. 263, 266 (N.Y. Sup. Ct. 1813).

subjected to these indecencies remain "secure in their persons, houses, papers and effects."

No right of privacy is violated? The guarantee by the Constitution of this essential liberty is unimpaired? The claim denies the Fourth Amendment any meaning, traducing the American Revolution into a corporate reorganization whose purpose was to facilitate press coverage of law enforcement theatricals. The claim is conflated with a flat *denial* by the law enforcement agents that the right of the people to be protected from government officials misusing their exclusive access to search and arrest warrants to facilitate press intrusions into the privacy and security of the people was manifestly included within core Fourth Amendment protections. As shown below, these claims are inimical to a free society and unsupported by the Constitution. The "strong jealousy of the abuses" of warrants and writs of the Framers produced in the Fourth Amendment the ultimate refutation of these claims.

STATEMENT OF THE CASE

A. Factual Background

In early 1993, the Media contacted Government Agent Scrafford and initiated negotiations with AUSA McLean on behalf of the Government to join a law enforcement investigation.[5] Those efforts resulted in the March 11, 1993 written agreement ("Agreement"), executed between AUSA McLean and CNN's Hamann, under which the Media were given "exclusive access" to the Berger Ranch to use as the backdrop for, and the search as a source of, video and audio recordings which the Media intended to and did repeatedly broadcast

[5] J.A. 44:¶¶34-36, 90, 97:¶¶18-20; R. 2:¶2, 8/7:36:5-25. Citations are to the (1) Joint Appendix ("J.A. [at page(s):paragraph]"); (2) Petitioner's Appendix To Petition For A Writ Of Certiorari ("P.A. [at page(s)]"); or (3) the Excerpts of Record ("R. [tab number/exhibit number and/or page and/or paragraph number within the tab]") pursuant to Ninth Circuit local rule 30-1.5.

worldwide on their various television outlets.[6] The Media, in turn, granted the Government Agents' express desire to publicize their personal efforts to enforce environmental laws.[7]

A week later, a United States Magistrate Judge issued sealed search and seizure warrants but was neither advised of the Agreement nor of the Media's pre-arranged plan with the Government to join, videotape and record the search.[8] The search warrant only authorized a search of "The Paul W. Berger Ranch with appurtenant structures, *excluding the residence*." (emphasis added) J.A. 92:¶7, 97:¶28.

In the early dawn of March 24, 1993, the Government Agents integrated the Media into the Government convoy of vehicles before the search of the remote Berger Ranch commenced.[9] With the Government Agents' assistance, the Media video and audio taped the convoy both from inside a Government vehicle and from a camera mounted on the exterior of another Government vehicle driven by Government Agents. J.A. 97:¶34; R. 8/8:T6:2-T7:2. Agent Scrafford was also fitted with a hidden Media microphone, broadcasting solely to a media recorder. J.A. 92:¶¶5-6, 97:¶37.

---

[6] P.A. 4a-5a; J.A. 44:¶¶34-40; 90, 97:¶¶1, 18-24, 34-50, 68, 69; R. 5/A, 8/1. Under the unsigned March 5, 1993 version of the Agreement, the FWS agreed to allow CNN to accompany its Agents in the execution of the search warrant; under the signed March 11, 1993 Agreement, CNN's permission was conferred by the United States Attorney's Office for the District of Montana instead of the FWS.

[7] J.A. 90, 131; R. 8/8:T11:7-8. "T[#]:[page]" refers to the [video]tape number and page(s) of the (incomplete) written transcription of the videotapes made during the Berger search entitled "Ring of Death." R. 8/8.

[8] R. 8/3, 8/4; J.A. 44:¶¶47-48, 97:¶¶25-27.

[9] R. 8/8:T6-T7:2. The Media were also permitted by the Government Agents to participate in and videotape and record the pre-search briefing conducted on or about March 23, 1994. J.A. 44:¶¶49-52, 97:¶¶29-33, 131; R. 8/8T1:3-4, T3:1-5, T:1-6. The Media were made privy to confidential information about the Bergers and the criminal investigation against Mr. Berger, including details about the sealed warrants and their execution. In addition, AUSA McLean agreed to give the Media an "exclusive" interview on the Berger Ranch during the search. J.A. 131.

Media cameras were focused on Mr. Berger as he came upon the Government convoy while driving his pick-up truck down the county road at approximately 6:00 a.m. He stopped and was approached by Government Agents including Agents Scrafford, Branzell and Prieksat. J.A. 92:¶¶2-3; R. 8/8:T7:2. Mr. Berger was not given a copy of the search warrant. He was told by Agent Scrafford that a search warrant was about to be executed at his Ranch. *Agent Scrafford falsely told Mr. Berger that the Court had ordered a search of every building; he was not told that the residence was excluded from the search.*[10] Agent Scrafford requested to ride in Mr. Berger's truck back to the Ranch, claiming that he wanted to explain the situation to Mrs. Berger.[11] Mr. Berger complied. J.A. 92:¶5; R. 8/8:T7:1-16. *Agent Scrafford informed Mr. Berger that he would be imprisoned, "run . . . down to the lockup in Billings," if he did not cooperate with the federal authorities.* R. 8/8T:3. Mr. Berger was shaking and very upset. J.A. 92:¶17; R. 8/8:102:13-15.[12]

The Government Agents knew that the Media could not lawfully enter the Berger Ranch. While Agent Scrafford would later testify at the criminal trial that he advised the Media that they could not enter the Berger Ranch during the search, on the day of the search, he and the other Government Agents facilitated the Media's entry onto the Berger Ranch

---

[10] J.A. 92:¶¶4, 7, 97:¶36. Agent Joel Scrafford to Mr. Berger: "we've been ordered by the court to search every building that you have here – and check your pastures for poison." R. 8/8:T7:6.

[11] Mrs. Berger was never a suspect or target of the underlying criminal investigation and was never charged with any criminal offense. No formal charges had been brought against Mr. Berger at the time of the search. R. 8:¶8; R. 8/3, 8/4.

[12] In 1993, Mr. Berger was 71 years old, in poor health and on oxygen and medication, having been in and out of the hospital during the previous five months and just released ten days earlier for treatment of pneumonia and high blood pressure. J.A. 92:¶17.

and into their residence.[13] The Media were allowed to enter the Berger Ranch when the search commenced and proceeded to videotape and record without limitation. The Government Agents and Media worked jointly to conceal the Media's identity, presence and activities on the Ranch. R. 8/8:T8:13.

The Bergers were never advised that the Media had entered the Ranch with the aid of the Government Agents and were videotaping and recording the search on the Bergers' land and in the various buildings. J.A. 92:¶¶5, 6, 8, 10-13, 18; R. 8/8:T8:13. The Bergers believed that the Media were Government Agents as they were all dressed in "street" clothes like the Agents and were indistinguishable from the law enforcement personnel. J.A. 92:¶¶11, 12; R. 8/8:T6:3.

The Bergers never knew that Agent Scrafford was the Media's human "boom mike" as he wore the hidden Media microphone which allowed the Media to secretly monitor and record everything being said solely for the Media's benefit. J.A. 92:¶¶5-6, 97:¶37. Even after Mr. Berger discovered the videocamera and protested, Hamann deftly directed the camera elsewhere and Agents Branzell and Scrafford helped to divert Mr. Berger's attention by bombarding him with leading questions. J.A. 92:¶¶5, 10; R. 8/8:T8:13. Mr. Berger was not advised that the Media were videotaping and recording him, including his interrogation by Agents Scrafford, Branzell and Prieksat, who asked him leading questions about his alleged use of illegal poisons and eagle killing. J.A. 92:¶¶5, 8-13, 97:¶¶37, 38, 41-42; R. 8/8:T7:1-16. Mr. Berger was never advised of any of his rights, including the right to remain silent. J.A. 92:¶¶9, 14, 97:¶¶39, 40; R. 8/8:T7:1-16. His concise affidavit is reproduced at pages 92 through 96 of the Joint Appendix.

Although the Berger residence was excluded from the search warrant, Agents Scrafford and Branzell repeatedly entered the Bergers' home and brought the Media inside each

---

[13] R. 8/7:37, 115; R. 8/8:T7:15-26. The testimony was given at a time when the media recordings were not available to the defense nor was the Agreement.

time through the hidden microphone.[14] Unbeknownst to the Bergers, their conversations were secretly monitored and recorded by the Media. J.A. 92:¶¶5, 6, 8, 10-13, 18; 97:¶48; R. 8/8:T7:15-16. Mrs. Berger was in the house. In March 1993, she was 81 years old and also recently hospitalized in ill health. J.A. 92:¶17.

Government Agents helped the Media set-up and obtain shots and provoked useful "sound bites" from Mr. Berger throughout the day-long search.[15] Many videotaped excerpts

---

[14] The Agents did not have consent to enter the Berger home and entered after Mr. Berger had been informed that every structure on his Ranch was covered by the Warrant and that he would be imprisoned if he did not cooperate. J.A. 92:¶¶5-6, 97:¶¶45-46. Agent Scrafford's testimony:

> Q. And yet you (Scrafford) went with him (Mr. Berger) everywhere he went that day, did you not?
> A. Yes, sir.
> Q. And at one point did you follow him into the house?
> A. Every time he went in the house, yes, sir.
>
> * * *
>
> Q. When you talk about going inside the house, I take it you didn't have a search warrant for the interior of the house did you?
> A. No, sir, I didn't.
> Q. Did you ask Mr. Berger for permission to go inside his house?
>
> * * *
>
> A. (No response.)
> Q. Did you ask Mr. Berger for permission to go inside his house?
> A. No, sir.

R. 8/7:115:7-116:4.

[15] J.A. 131; R. 8/5, 8/8:T11:2-8. The Media filmed on-camera interviews of the Agents and AUSA McLean made at the Berger Ranch. During one lengthy interview, AUSA McLean made disparaging and personal remarks about Mr. Berger. AUSA McLean met with the Media numerous times during his confidential investigation and made confidential disclosures. J.A. 44:¶¶35-44, 51-54, 74, 75; R. 8/8:T11:7-8.

or "outtakes" of Mr. Berger's images and statements, interiors of ranch buildings, outdoor locations and scenes of the Agents' search and seizure of "evidence" were incorporated into a Media program entitled "Ring of Death." J.A. 131; R. 8/8:T(entire). Although Mr. Berger was acquitted by a jury of three felony counts of killing at least one eagle and convicted only of using a pesticide contrary to its labelling, a misdemeanor, Hamann introduced the segment by implying that Mr. Berger had killed hundreds of eagles. *Id.* In addition, a few days before Mr. Berger's sentencing on the misdemeanor count, Agent Hanlon sent a letter on official Government stationery to "[a]ll participants in the Paul Berger (INV.4506AO) eagle poisoning investigations" announcing the broadcast schedule for the "Ring of Death" on Turner and CNN programs, "Earth Matters" and "Network Earth" and proclaiming:

> the Paul Bergers and non-believers of the world will have a chance to see and hear the truth through the CNN video, not just in Sand Springs, Montana, but the whole WORLD . . . Japan, Chile, France, and every place in between.

R. 8/10. CNN and Turner channels broadcast the segment nationally and internationally at least ten (10) times through April 1994. R. 8/8T12:1-3; 8/9:4. It may still be being broadcast somewhere in the world today.

B. The District Court Proceedings

The Bergers filed two related civil actions against the Government and Media in the United States District Court in Montana under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the federal wiretap act (18 U.S.C. §§2510, *et seq.*), state common law, for declaratory and injunctive relief and monetary damages. On February 26, 1996, *without discovery*, the district court entered an order and judgment granting summary judgment on

all counts of the Complaint in favor of the Government and Media. P.A. 27a-47a. The district court adopted the Government's characterization of the "right" asserted by the Bergers. The district court erroneously decided the Government did not violate the Fourth Amendment in allowing the Media to enter private property under the authority of a search warrant to "observe" the Government execute the warrant.[16] The Bergers' Notice of Appeal was timely filed on March 5, 1996. R. 11.

C. The Decision By The Court of Appeals

By unanimous decision, the Ninth Circuit held that the Bergers' Fourth Amendment rights were violated by Government Agents utilizing a federal search warrant to authorize the Media's entry onto the Bergers' private Ranch and into their home and reversed the district court. The Ninth Circuit recognized that at the time of the search in March 1993, the Fourth Amendment violation was "clearly established" law, relying on *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994) (the law was "clearly established" in March 1992 that government officials cannot permit the media onto private property during searches), *cert. denied*, 514 U.S. 1062 (1995), *aff'g Ayeni v. CBS Inc.*, 848 F. Supp. 362 (E.D.N.Y. 1994); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (the law was "clearly established" in November 1992 that law enforcement cannot use a search warrant to facilitate private searches); and 18 U.S.C. §3105 (prohibiting "any persons,

---

[16] P.A. 36a. Mr. Berger's motion to suppress evidence for lack of probable cause was denied (R. 5/G) even though statements *he* (not Mrs. Berger) made to federal agents violated his *Miranda* rights, the search warrant was stale (based on two-year old information) and property in the warrant was improperly described. J.A. 33; R. 8:¶9. The trial court denied Mr. Berger an opportunity to investigate the extent of the Media's participation and any discussion of the Media during that suppression hearing, "was limited to our attempts to discover whether there was a written agreement between CNN and the Government, and whether videotapes existed, nothing more. . . . " R. 8:¶10.

other than law enforcement personnel and those assisting them, from executing search warrants"). P.A. 10a-12a.

The Ninth Circuit properly refused to rely on the older, lower court decisions relied on by the district court and by the Government, as inapposite and non-controlling. *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984). P.A. 35a. The Ninth Circuit noted that those cases did not involve the Media "as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." P.A. 12a-13a.

As to the Government Agents' conduct, the Ninth Circuit properly applied this Court's standard for qualified immunity in reversing the district court and holding that the Agents were not immune from suit. P.A. 10a-11a (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The court concluded that "no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." P.A. 10a-11a (citing *Ayeni v. Mottola*, 35 F.3d at 686; *Buonocore*, 65 F.3d at 356; 18 U.S.C. §3105). According to the Ninth Circuit, it was compelled to "heed its strictures on the potential abuse of law enforcement powers" in applying the Fourth Amendment because:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose . . . . This search violated [the Fourth Amendment's] protections.

P.A. 9a-10a.

SUMMARY OF ARGUMENT

This case does not present a novel concept of Constitutional law. The Fourth Amendment limitation on Government intrusions into privacy has been a core value of the United States Constitution for more than two hundred years. Indispensable to protecting that fundamental right is the search warrant requirement. Limiting the scope of a search warrant as particularized is mandated; only executive officers authorized by the warrant may lawfully invade privacy. The Constitutional limitations as they apply here have been clearly established for decades.

This case involves a failure to heed the Constitutional limitations of the search warrant requirement. There is nothing that the Agents did not or could not know about obtaining and executing a search warrant in March 1993. The search of the Berger Ranch should have been conducted within the clearly established limits of the Fourth Amendment, but it was not. AUSA McLean – in charge of the confidential criminal investigation of Mr. Berger – executed a secret contract with the Media allowing the Media to join the Agents in executing a sealed search warrant on the Bergers' remote ranch. The Media was allowed to videotape and record everything for a television program. This was in direct violation of Section 3105 of Title 18, which makes explicit the Fourth Amendment's prohibition against private persons serving search warrants except when aiding the officer on his requiring assistance.

This case involves conduct that was unreasonable as it exceeded the clearly established limits to which rights can be invaded by law enforcement in the execution of a search warrant. The Agents are not protected by qualified immunity. The conduct by the Government with the Media violated the core principles of the Fourth Amendment and violated the Bergers' rights.

This case asks whether law enforcement violates the Fourth Amendment by allowing private parties onto private property during law enforcement activities and whether law

enforcement is immune from liability if the Fourth Amendment is violated. Resolution of the questions presented is not dependent upon whether courts of lesser jurisdiction have or have not decided the precise issues. Under clearly established Fourth Amendment principles, the answer can only be in the affirmative. Government Agents cannot be allowed to use a search warrant as a "press pass" for the Media.

ARGUMENT

I. LAW ENFORCEMENT VIOLATES THE FOURTH AMENDMENT BY ALLOWING THE MEDIA TO JOIN THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY AND TO VIDEOTAPE AND RECORD THE SEARCH FOR PRIVATE PURPOSES AND NOT IN AID OF ANY LAW ENFORCEMENT EFFORT

A. Privacy Is The Core Value Of The Fourth Amendment

The right to privacy was established by the Framers of the Fourth Amendment more than two hundred years ago with a lineage deriving from old English common law.[17] "At the

[17] *Boyd v. United States*, 116 U.S. 616, 626-630 (1886); *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (K.B. 1765). The late Judge Jerome Frank made the point in more contemporary language:

> A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get him without disobeying the Constitution. That is still a sizable hunk of liberty – worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate – place which is a man's castle.

United States v. On Lee, 193 F.2d 306, 315-316 (2d Cir. 1951) (J. Frank, dissenting); *see also Silverman v. United States*, 365 U.S. 505, 511 n.4 (1961). The Amicus Brief filed concurrently by NASCAT in this case provides an extensive analysis of the historical basis of the Fourth Amendment and the Constitutional rights violated here.

very core of the Fourth Amendment stands the right of a man to retreat into his own home" and there be free from unreasonable governmental intrusion.[18] The fundamental nature of our Fourth Amendment rights has continually been reaffirmed by this Court,

> to be regarded as of the very essence of the constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen.[19]

1. The Sanctity Of The Home Is Inviolable

The principle object of the Fourth Amendment is the protection of privacy from encroachment by government officials.[20] The guarantee of the Fourth Amendment "extends to the innocent and guilty alike . . . [i]t marks the right of

[18] *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992). In *Soldal*, Justice White delivered the opinion of a unanimous Court and reiterated the Court's prior observations in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967), "that the 'principle' object of the Amendment is the protection of privacy rather than property and that 'this shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform.' " *Soldal*, 506 U.S. at 64 (internal citations omitted).

[19] *Gouled v. United States*, 255 U.S. 298, 304 (1921), *overruled in part by Warden*, 387 U.S. at 294; *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

[20] *Soldal*, 506 U.S. at 64 (1992) (citing *Warden*, 387 U.S. at 304); *Winston v. Lee*, 470 U.S. 753, 758 (1985). The Fourth Amendment is enforceable against an officer of the Government for acts conducted under the color of office or authority (*Silverthorne Lumber v. United States*, 251 U.S. 385, 391 (1920)) and against private parties engaged in "state action" with the Government. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971). *Warden* rejected the common-law notion advanced in *Entick* and *Gouled* that a warrant to search or seize was dependent upon a superior government interest in property. *Id.*, 387 U.S. at 302-307.

privacy as one of the unique values of our civilization."[21] While the zone of privacy is protected in a variety of settings, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms" in the Fourth Amendment.[22] The protected zone of individual privacy encompasses the home and surrounding private property.[23]

2. Expectations Of Privacy Are Protected

The Fourth Amendment right to privacy is implicated when a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (J. Harlan, concurring). This expectation is set forth in the first clause of the Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment

> protects two types of expectations, one involving "searches," and the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs where there is some meaningful interference with an individual's possessory interests in that property.

Id. See also Horton v. California, 496 U.S. 128, 133 (1990).

In March of 1993, the Bergers had reasonable expectations of privacy in their home and surrounding areas of their Ranch. Agent Hanlon applied for and the Magistrate Judge issued search and seizure warrants authorizing the search of the Berger Ranch. Obtaining the warrants was a procedural acknowledgement of the expectations of privacy to be protected. J.A. 17-43. To further protect these expectations the Magistrate Judge limited the scope of the search by specifically excluding the Berger residence from the search warrant. J.A. 17, 95:¶18. Without advising the Magistrate Judge, the Agents took the Media onto the Bergers' private property. The Agents took a hidden media microphone repeatedly into the residence. The Bergers' private conversations were monitored and recorded. Their conversations, possessions and property were recorded and photographed. These actions were taken not by law enforcement for evidentiary purposes but by private parties for their undisclosed and unregulated purposes. These are the means by which the Bergers contend that the Agents violated the Bergers' Fourth Amendment rights. J.A. 44-91, 97:¶¶37-48; R. 8/7:37, 8/8:T7:1-26.

B. The Fourth Amendment Is Violated When Law Enforcement Exceeds The Clearly Established Constitutional Limitations Of The Search Warrant Requirement

1. A Search Warrant Is An Express Limitation On Law Enforcement Authority To Conduct A Search

At the core of the Fourth Amendment is the fundamental concept that any governmental intrusion into an individual's home or expectation of privacy must be strictly

---

[21] *McDonald v. United States*, 335 U.S. 451, 453 (1948).

[22] *Payton v. New York*, 445 U.S. 573, 589 (1980) (warrant required for arrest inside a home). *See Silverman*, 365 U.S. at 511 (reversing conviction where police placed physically intrusive electronic listening devices within a home); *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (warrantless search inside residential hotel room unreasonable). *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 565 (1976) (private dwellings are afforded the most stringent protections of the Fourth Amendment as compared to automobiles).

[23] *See Michigan v. Tyler*, 436 U.S. 499, 504 (1978) (the expectation of privacy protected by the Fourth Amendment "extends beyond the paradigmatic entry of a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of a crime."); *Oliver v. United States*, 466 U.S. 170, 180 (1984); ("curtilage" at common law included property involving "the intimate activity associated with the sanctity of a man's home and the privacies of life.").

circumscribed.[24] The Framers "interposed the warrant requirement between the public and police" to limit that intrusion.[25] The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement." *United States v. United States District Court*, 407 U.S. 297, 315-16 (1972).

What is "central to this procedure is an independent control over the actions of officers effecting searches of private premises." *Abel v. United States*, 362 U.S. 217, 252 (1960). As the Court held in *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976), "responsible officials, including judicial officials, must take care to assure that [searches and seizures that may reveal innocuous, private information] are

---

[24] *Payton*, 445 U.S. at 582 n.17. This Court has long-recognized that Fourth Amendment protections against government intrusion should be liberally construed. *Boyd v. United States*, 116 U.S. 616, 635 (1886); *see Sgro v. United States*, 287 U.S. 206, 210 (1932) (Fourth Amendment and legislation regulating search warrants should be liberally construed in an individual's favor) (citing *Boyd*, 116 U.S. at 635; *Byars v. United States*, 273 U.S. 28, 32 (1927); *Marron v. United States*, 275 U.S. 192, 196-97 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

[25] *Marron*, 275 U.S. at 196. As a general rule, law enforcement may only intrude on private property with a search warrant issued by a neutral magistrate based on probable cause. *See Maryland v. Buie*, 494 U.S. 325, 329 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (or under a specific exception to the warrant requirement). Probable cause to justify a search must be made by "a *neutral* and *detached* magistrate instead of by the officer engaged in the competition of ferreting out crime." *Johnson*, 333 U.S. at 14 (emphasis in original). "The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.' " *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (internal citations omitted).

conducted in a manner that minimizes unwarranted intrusions upon privacy."

To ensure that governmental intrusions remain restricted it has also been clearly established that the warrant particularly describe the persons, places or things to be seized. *See Mapp v. Ohio*, 367 U.S. 643, 647 (1961); *Stanford v. Texas*, 379 U.S. 476, 481 (1965). The scope of a search under "[t]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant."[26] Furthermore, *the express authorization of the warrant – and federal statute – also limit the persons who are authorized to participate in the search and seizure. See* 28 U.S.C. §3105.

Writing for the majority in *Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987), Justice Stevens reiterated the constitutional magnitude of the limitations of the Fourth Amendment stating:

> Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."[27]

While interpretation of the Fourth Amendment has led to the clear establishment of express limitations on the use of warrants, implicit in the first clause of the Amendment is a

---

[26] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394-95 n.7 (1971) (citing *Marron*, 275 U.S. at 196 (1927)); *Dalia v. United States*, 441 U.S. 238, 259-60 (1979). Contrary to here, the covert entry to install an eavesdropping device in *Dalia* was affirmed by this Court as reasonable where federal agents obtained a valid search warrant specifically authorizing the electronic surveillance based on an affidavit submitted to the magistrate judge that described the office to be surveilled with particularity. *Id.* at 257.

[27] Justice Butler, writing for a unanimous court in *Marron*, 275 U.S. at 195-96, noted that "[g]eneral searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them . . . As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

recognition that any governmental intrusion must be reasonable. Although the language is general, this Court has long-held that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."[28] A "reasonable search" is not to be determined by any fixed formula but is to be resolved according to the facts of each case and is in the first instance for the District Court to determine. *United States v. Rabinowitz*, 339 U.S. 56, 63 (1950), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969). In practical terms, the reasonableness of the search or seizure depends in part on how it is carried out.[29]

The most basic constitutional rule is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically delineated exceptions." *Katz*, 389 U.S. at 357.[30] The *per se* unreasonable rule also applies to seizures "unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." *United States v. Place*, 462 U.S. 696, 701 (1983) (footnote omitted) (citing *Marron*, 275 U.S. 192, 196 (1927).

The Agents' claim is that the Fourth Amendment authorizes the Media, constitutionally uncontrolled actors, entry into the place to be searched. They further claim that these unconstitutionally controlled actors are authorized to search and seize not merely evidence, but anything of interest. These claims are antithetical to the purpose of the warrant requirement.

---

[28] *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (Butler, J.); *Ker v. California*, 374 U.S. 23, 33 (1963) (Clark, J.).

[29] *See Graham v. Connor*, 490 U.S. 386, 395 (1989).

[30] The exceptions are "jealously and carefully drawn" (*Jones v. United States*, 357 U.S. 493, 499 (1958)), and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456 (1948).

This Court's Fourth Amendment jurisprudence for over two hundred years has clarified and applied these "rules." The syllogism is simple. The objective of the warrant is property or a person; the reasonable search by particularized warrant is the vehicle. These rules are enforced in several ways against abuse by law enforcement officials: suppression of evidence, criminal liability (*e.g.* 18 U.S.C. §§2234-2236)[31] and civil liability (42 U.S.C. §1983 and *Bivens* actions); in addition, police agencies are subject to public, political control and, if appropriate, condemnation. Presumably their officials, and the governments they are part of, are subject to political repudiation or, at least, exposure for abuses.

What standard governs these media actors claimed to be granted access to private property by the Fourth Amendment? The claim that the warrant also allows the presence of private parties destroys the carefully crafted series of protections central to the structure of the Amendment. What standards are enforceable against the press? Are they held to the limitations applicable to the authorized agents of government? May they film and photograph everything their equipment can see and record everything their equipment can hear? And publish all that they can film and record? May they write about and publish everything that they observe? What sanctions are available should they transgress whatever rules a court, faced as one inevitably will be with abuses, may find reasonable? Is the standard what would be constitutionally reasonable? Or the limitations set forth in the warrant?

---

[31] The federal government is strangely reluctant to indict its officers and prosecutors for their excesses in this area. 3 Charles Alan Wright, *Federal Practice and Procedure: Criminal* §661 n.13 (2d ed. 1982):

> Probably the least used of the other statutes are 18 U.S.C.A. §§2234-2236, providing criminal penalties for exceeding authority in executing a search warrant, procuring a search warrant maliciously, and searching without a warrant. It was the failure to use statutes such as these that made the exclusionary rule seem necessary.

It is preposterous to claim that the Fourth Amendment described in the prior opinions of this Court authorizes reporters entry, rather then the restrained "executive officers" described in *Rabinowitz* whose conduct is to be "independently controlled" in *Abel* so that the "unwarranted intrusions on privacy" condemned in *Andresen* may be minimized. Certainly, no opinion of this Court even hints that the Fourth Amendment contains such a licentious permission. This Court did not allow the security of the people to be subject to official "whim or caprice" in *Wong Sun*. How can the Amendment be interpreted to subject the people to the designedly greater intrusions of the press? As amply shown above, the purpose of the Amendment and the decisions of this Court implementing its original intention have been to restrain government conduct and limit its intrusiveness, not to authorize unlimited and uncontrolled access to private parties.

2. The Agents Exceeded The Limitations Of The Search Warrant Without Authority

a. The Search Warrant Did Not Expressly Authorize The Media's Presence

The Magistrate Judge authorized a very specific, particularized warrant limited to:

> Documents, records, coyote getters, cyanide charges, chemicals, livestock, carcasses and wildlife carcasses, including eagles, which would document the taking of wildlife in violation of Federal laws (16 USC §668, 16 USC §703, and 16 USC §1538).

J.A. 17. The warrant was issued to petitioner Rodney C. Hanlon and limited for execution by him as the "Special Agent, U.S.F.W.S. and Any Authorized Officer of the United States." *Id*. As noted above, the residence was specifically excluded.

In accordance with *Mapp v. Ohio*, 367 U.S. 643, 647 (1961), the warrant particularly described the things to be seized. J.A. 17. The Magistrate Judge issued the warrant to a specific federal officer in accordance with the requirement of

Bivens that the warrant limit the officers authorized to participate. *Bivens*, 403 U.S. at 394 n.7. The warrant did not expressly authorize the Media to accompany the Agents and to observe and record the search. Indeed, the Agents concealed from the Magistrate Judge that by pre-arranged plan the Media would join them and video and audiotape the Bergers and their home. J.A. 44:¶¶34-41, 90, 131.

Despite these limitations, the federal officers here claimed the right to enter and, pursuant to that claim, did repeatedly enter the residence. Not content with these violations, these federal officers used their authority to facilitate unauthorized Media persons to enter and roam throughout the ranch and its buildings filming and recording as the Media saw fit. Further, the federal officers facilitated the recording within the residence by the Media of the Bergers' conversations. None of this film or recording was gathered as evidence. Rather, by contract with the United States Department of Justice, "CNN shall have complete editorial control over any footage it shoots; it shall not be obliged to use the footage." J.A. 90-91. Thus, there was an explicit Agreement that the Media's presence recording and filming was not for the purpose of gathering the evidence detailed in the warrant. In fact, the footage and the Agreement were withheld from the Bergers during the criminal trial.

A valid warrant does not validate an unreasonable search. *Bivens*, 403 U.S. at 394-395 n.7; *Marron*, 275 U.S. at 196. This conduct was not reasonably necessary to further the restricted purposes of searching for and seizing the specifically identified property listed in the warrant. Therefore, the violation of the Fourth Amendment is clear.

b. Videotaping And Recording By The Media For Private Purposes Was A Search And Seizure That Did Not Serve Law Enforcement Purposes

The Fourth Amendment governs not only tangible items, but extends as well to the recording of oral statements overheard. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

Capturing a conversation by eavesdropping is a search and seizure. *See Berger v. New York*, 388 U.S. 41, 50-52, 58-59 (1967).

Although the government may use an "invited informer" with a surreptitious recording device to obtain information for legitimate law enforcement purposes,[32] the Ninth Circuit held that the invited informer doctrine does not apply here because, *law enforcement authority was used to assist commercial television, not to further law enforcement objectives.* P.A. 15a-16a (emphasis added). The correctness of that finding is beyond dispute.

Law enforcement agents may only exceed the limits of a warrant when they have an implied justification reasonably necessary to further the warrant's purpose. *Michigan v. Summers*, 452 U.S. 692, 704-705 (1981) (reasonable to detain citizen while executing valid warrant for contraband in citizen's home); *see Payton v. New York*, 445 U.S. 573, 602 (1980) (valid arrest warrant carries implied authority to enter suspect's home with reason to believe suspect is within). The search warrant here expressly limited the Government Agents' authority to control the Bergers' property; that limited control cannot be expanded by implication to legitimize the Media's presence. *Summers*, 452 U.S. at 704-705; *Payton*, 455 U.S. at 602.

The deceptive means by which the Agents acted to serve the Media's interests underscores the extent to which the scope of the search warrant was exceeded. This Court has consistently condemned law enforcement who disregard search warrant restrictions simply because they seek to obtain incriminating evidence by deception rather than through a routine search. *See Gouled v. United States*, 255 U.S. 298 (1921). In that case, the government agent gained admission into a criminal suspect's office on the pretext of paying a social visit and while inside surreptitiously seized incriminating evidence that was later used in a criminal prosecution

---

[32] *See United States v. White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. On Lee*, 343 U.S. 747 (1952).

against the suspect. *Id.* at 305-306. In unanimously concluding that the warrantless search and seizure violated the Fourth Amendment, this Court reasoned:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Id.; *see also Bumper v. North Carolina*, 391 U.S. 543, 548-50 (1968).

This court in *Gouled* answered the Agents' claim. They gained entrance to the Bergers' home by misrepresentation of their lawful authority and by armed force and threats of imprisonment. They gained entrance for the Media by the same means. Thus, the Government Agents violated the Fourth Amendment when they allowed the Media onto the Berger Ranch.

c. Assisting The Media To Videotape And Record The Search Was Beyond The Scope And Authority Of The Search Warrant And Unreasonable

This Court has long recognized that the Fourth Amendment protects against unauthorized law enforcement seizures

of evidence that include not only tangible objects but whatever law enforcement has seen or heard during an unlawful invasion. *See United States v. White*, 401 U.S. 745, 748 (1971); *Silverman*, 365 U.S. at 509. *See Berger*, 388 U.S. at 50-52, 58-59 (in ruling on the constitutionality of a New York eavesdropping statute under the Fourth and Fourteenth Amendments, this Court made clear that capturing a conversation by eavesdropping is a "search" and "seizure").

Conversational privacy is a clearly established Fourth Amendment right that has been protected by this Court for more than thirty years. *Alderman v. United States*, 394 U.S. 165 (1969).[33] In that case, this Court was asked to relate the standards and procedures to the trial court for determination of whether the Government's surveillance violated the Fourth Amendment. *Id.* at 167. In so doing, the Court reaffirmed that the right to conversational privacy under the Fourth Amendment against the "uninvited ears" of law enforcement has been recognized since it decided *Silverman*, 365 U.S. 505 and *Wong Sun v. United States*, 371 U.S. 471 (1963). *Alderman*, 394 U.S. at 171.

Covert entry by law enforcement without a warrant has long been condemned by this Court as a means by which conversational privacy is violated under the Fourth Amendment. While the incriminating statements in *Silverman* and *Wong Sun* were suppressed as fruits of an unlawful physical invasion of private property, this Court found that conversations that are the fruits of an unlawful surveillance should not be treated any differently, noting that, "conversations and property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home." *Alderman*, 394 U.S. at 180. *See Katz*, 389 U.S. 347 (1967) (recognizing a

---

[33] This Court's recognition of the protectable nature of private conversations is contrary to petitioners' reliance on the district court's dismissal of the Bergers' private conversations as intangible and thus incapable of seizure. P.A. 43a-44a.

constitutional right of privacy in private premises). In delivering the opinion of the majority of the Court, Justice White reasoned that,

> We do not deprecate Fourth Amendment rights. The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed.

Alderman, 394 U.S. at 175.

Covert entry was the means by which the "uninvited ears" of law enforcement violated the Fourth Amendment in *Silverman*. In that case, police were investigating allegations of an illegal gambling operation in a home in Washington, D.C. *Silverman*, 365 U.S. at 506. With the consent of the owner of the vacant adjoining row house, but without a search warrant, police inserted an electronic listening device (a "spike-mike") through the common wall which became attached to the heating duct of the suspects' house. *Id.* In effect, the "spike-mike" converted the heating duct into a giant microphone. *Id.* at 506-507, 509. Police testimony about the incriminating conversations they heard through the spike-mike resulted in convictions which were upheld on appeal. *Id.* at 506. In reversing the convictions, Justice Stewart, writing for the majority, held that the Fourth Amendment was violated because the

> officers overheard the petitioners' conversations by usurping part of the petitioners' house or office – a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent.

Id. at 511.

In *Irvine v. California*, 347 U.S. 128 (1954), a plurality of this Court held that the police officers' covert entry of the defendant's home without a search warrant or other process to install an electronic bugging device, "flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the Federal Government." *Id.* at 132.

In this case, the "uninvited ears" and "uninvited eyes" included those of the Media and the rest of the world by means of both a physical invasion of private property and surreptitious surveillance. Unlike law enforcement in *Silverman* and *Irvine* who had a lawful purpose but no warrant and *Dalia* where law enforcement obtained a warrant to eavesdrop, the Government Agents and the Media had *no* lawful purpose to eavesdrop on the Bergers and no warrant authorizing the Media's videotaping and recording. The intrusion into the Berger residence by the Government Agents and the Media was, as this Court characterized the conduct in *Silverman*, by usurpation. J.A. 17-18, 44:¶¶34-48; R. 8/2.

The Government Agents' reliance on an old line of cases under the "invited informer" doctrine does not resolve their problem. Pet. 15. In every case, the government agent or third party informer did not violate the Fourth Amendment because they were all engaged in a legitimate law enforcement purpose.[34] Thus, petitioners' claim that "the Bergers had no Fourth Amendment expectations of privacy that could be violated when Agent Scrafford wore the hidden Media microphone into their residence," under the "invited informer" doctrine and administrative search cases they cite must be

[34] Petitioners' reliance on *United States v. White*, 401 U.S. 745 (1971), does not address the question presented. The government agents conducting a narcotics investigation in *White* did not have a warrant when they eavesdropped on incriminating conversations between respondent White and their informant who wore a hidden receiver in various locations including White's home. *Id.* at 747. White's narcotics conviction was based on the testimony of the eavesdropping agents after the informant could not be found. *Id.* The Court of Appeals reversed on the grounds that this Court's decision in *Katz* prohibits warrantless intrusions of privacy in one's home. *Id.* This Court ruled, however, that because *Katz* was decided *after* the eavesdropping occurred in *White*, the *Katz* decision could not be applied retroactively; thus, this Court was compelled to reverse the Court of Appeals and apply older cases in which warrantless eavesdropping did not violate the Fourth Amendment without a physical intrusion. *White*, 401 U.S. at 750-53.

rejected for the same reasons that the Media's reliance on the doctrine was rejected by the Ninth Circuit.[35]

The "invited informer" doctrine was developed in situations where the government places informers, often with surreptitious recording devices, to obtain information for legitimate law enforcement purposes. *See White*, 401 U.S. 745 (1971); *Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. On Lee*, 343 U.S. 747 (1952). The Ninth Circuit's analysis,[36] like this Court's rationale for ruling in *Silverman*, applies here, that the decision "did not turn upon the technicality of a trespass upon a party wall as a matter of local law" but on wrongful conduct requiring redress:

> It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: "[i]t may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices

[35] Petitioners' reliance on other invited informer and administrative search cases underscores the Fourth Amendment violation that occurred here. Pet. 15. *See Lopez v. United States*, 373 U.S. 427 (1963) (administrative search by IRS agent); *On Lee v. United States*, 343 U.S. 747 (1952) (government informer invited into suspect's business); *United States v. Caceres*, 440 U.S. 741, 752 (1979) (upholding administrative search at IRS agent's office without mentioning *Katz* or *Berger* where agent failed to obtain prior authorization under IRS regulations). In dissenting in *White*, Justice Douglas expressed his concern that *On Lee* and *Lopez* were products of old common-law notions of trespass as opposed to *Berger* and *Katz*, where the more recent cases emphasize that with few exceptions, "searches conducted outside of judicial process, without prior approval of a judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *White*, 401 U.S. 760-765 (Harlan, J., dissenting). Justice Harlan added in his dissent that *On Lee* is not sound law and disagreed that *Katz* was not controlling. *Id.* at 768-69.

[36] In rejecting the Media's reliance on the doctrine to justify the taping inside the Bergers' home, the Ninth Circuit held that the Media was not shielded from liability and engaged in "state action," stating, "the Bergers had an expectation of privacy in their conversations with Agent Scrafford, and that the [Media] infringed that privacy when they recorded the Bergers' conversations inside the house." P.A. 17a.

> get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

Silverman, 365 U.S. at 512 (citing *Boyd v. United States*, 116 U.S. 616, 635 (1886)). Petitioners violated the Fourth Amendment when Agent Scrafford acted as the Media's "boom" mike inside the Bergers' residence, by allowing the Media to videotape and record the execution of the search and by acting as the Media's "spike-mike."

3. The Bergers Did Not Grant Consent: The Agents Entered The Bergers' Home Pursuant To Their False Claim That The Court Ordered the Search Of Every Building On The Ranch

There can be no consent to a search where there is coercion, as where law enforcement officers claim authority to search a home under a warrant, thereby announcing in effect that the occupant has no right to resist the search.[37] In *Bumper*, 391 U.S. at 550, this Court invalidated a search where a homeowner consented to the search only after police claimed to have a valid search warrant. That is precisely what happened here.

The Fourth Amendment requires that two competing concerns be evaluated to determine voluntary consent: (1) the legitimate need for the search and (2) the absence of coercion. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (knowledge of right to refuse is but one factor in determining voluntariness of consent). The facts surrounding the repeated searches of the Bergers' home show not only that there was no legitimate law enforcement need for the Media's presence, but also that the Government agents coerced the Bergers to submit to these searches.

The Government's improper claim of authority under the search warrant to enter the Bergers' home fails to meet the

---

[37] *See* Title 18 U.S.C. §2231 imposing severe penalties on one who, "resists, opposes, prevents, impedes . . . or interferes" *inter alia*, with one executing a search warrant.

burden that consent was freely and voluntarily given and not coerced. A search conducted relying upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. *Bumper*, 391 U.S. at 549. The Agents, in seeking to rely upon consent to justify the lawfulness of this search, have the burden of proving that the consent was, in fact, freely and voluntarily given and this burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Id.*

Here, Agent Scrafford gained entry into the Berger residence by coercion, not consent. Specifically, he falsely told Mr. Berger that the court had ordered a search of every building on the Ranch, failing to state that the residence was excluded from the search. J.A. 17, 93:¶7, 116:¶36; R. 8/8:T7:6. Moreover, Agent Scrafford threatened Mr. Berger with imprisonment if he did not submit to the federal authorities. R. 8/8T:3. Agent Scrafford has also sworn that he never asked permission for his repeated entries of the residence.[38]

The circumstances presented are consistent with this Court's suggestion in *Bivens* that consent to enter cannot be voluntary when the request is made by federal law enforcement. In that case, Justice Stewart, writing for the majority, noted that when a private person demands entry into another's home, the police can be called to prevent a trespass:

> But one who demands admission under a claim of federal authority stands in a far different position. The mere invocation of federal power by a federal law enforcement official will normally render futile any attempt to resist an unlawful entry or arrest by resort to the local police; and a claim of authority to enter is likely to unlock the door as well.

Bivens, 403 U.S. at 394-95.

Mr. Berger, old and ill, was shaking and very upset. J.A. 95:¶17. Naturally, he did not deny entrance to his home. To do so would have been extremely foolish in the face of a multitude of armed Agents. Mr. Berger had no knowledge that he could bar the Agents from his home; indeed, he reasonably

---

[38] *See* n.14, *supra*.

believed the exact opposite. *See* Berger Affidavit. J.A. 93-95. Under these circumstances, the facts demonstrate clearly that the agents gained admittance to the Bergers' residence under improper assertion of federal authority and that this coercion violated the Bergers' Fourth Amendment rights.

4. There Was No Exigency To The Search To Imply Any Justification For The Agents' Entry Into The Bergers' Home With The Media

The Agents' contention that the presence of the Media was justified as a common law enforcement practice is not supported by the facts or law. Pet. 22-26, 44-46. The Agents rely on *Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977), to support the Media's presence in Montana under a Florida state doctrine of implied consent by custom and usage invoked during natural disasters or emergencies. Pet. 23. In that case, which the Florida Supreme Court characterized as "a disaster of great public interest," a press photographer was requested by the fire department to take photographs for their investigation of a horrific fire. *Id.* at 918. The Ninth Circuit rejected the Media's reliance on *Fletcher* as widely distinguished by other courts, and noted that there was no disaster here. P.A. 23a-24a. The Agents' reliance on the fire investigation rationale of *Fletcher* was rejected by this Court in *Michigan v. Clifford*, 464 U.S. 287 (1984), where a plurality held that absent exigent circumstance, a warrantless, nonconsensual entry into a private home – even by fire investigators – unreasonably violates expectations of privacy under the Fourth and Fourteenth Amendments. The *Clifford* rationale applies here.

The Agents also rely on a number of other state cases to suggest that the Media's presence was permissible because "in none of these cases was such conduct found to have violated the Fourth Amendment." Pet. 22. However, the Agents inaccurately rely on cases alleging state law claims where the Fourth Amendment was not at issue. *See Miller v. National Broadcasting Co.*, 187 Cal. App. 3d 1463, 1482-88 (1986) (state constitutional right to privacy was violated when camera

crew entered home with paramedics to film plaintiff's dying husband without her consent); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1981) ("[i]f the media were to succeed in compelling an uninvited and nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists"); *Prahl v. Brosamle*, 295 N.W.2d 768, 780 (Wis. Ct. App. 1980) (no implied consent by custom and usage to excuse trespass claim against media).[39] The Agents' reliance on these cases does not address the question presented and only underscores the Constitutional dimensions of the wrong that occurred. *See Bivens*, 403 U.S. at 394-95; *Illinois v. Rodriguez*, 497 U.S. 177, 187 (1990) (what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated).

5. The Plain View Doctrine Does Not Validate The Media's Private Search

This Court recognizes that a valid search warrant will not generally validate a search or seizure that exceeds the scope of the warrant unless one of the exceptions applies. *See Coolidge v. New Hamphire*, 403 U.S. 443, 465 (1971); *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Nor will a warrantless search and

---

[39] The Agents also cite: *Scott v. Florida*, 559 So.2d 269, 272 (Fla. Dist. Ct. App. 1990) (appeals court expressly refused to address whether television crew infringed privacy but reversed and remanded the drug conviction on other grounds); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106, 1110 (Or. Ct. App. 1990) (dismissal of state privacy claim upheld on grounds that trial court did not err on jury instruction and dismissal of "false light" invasion claim affirmed because one-year limitations period ran before suit was filed); *Rogers v. Buckel*, 615 N.E.2d 669, 671-673 (Ohio Ct. App. 1992) (summary judgment in favor of media reversed as to state invasion of privacy and defamation claims where genuine issues of material facts existed as to falsity of how plaintiff and her children were portrayed for being involved with crack cocaine). *See infra* at Section I.B. 5, 6.

seizure be validated unless one of the exceptions applies. *Coolidge*, 403 U.S. at 465; *Horton v. California*, 496 U.S. 128, 136-37 (1990). The exceptions, however, are "jealously and carefully drawn" and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made the course imperative." *Coolidge*, 403 U.S. at 455 (citations omitted).

The Agents contend that the Media's videotaping and recording of the private images and conversations of the Bergers was permitted under the "plain view" exception to the search warrant requirement. Pet. 16. There has been no showing that this Court's conditions for applying the doctrine have been met to validate the presence of the Media.

This Court has made clear that the "plain view" doctrine applies only when law enforcement have not violated the Fourth Amendment for the intrusion which inadvertently leads to finding incriminating evidence against an accused in plain view. *Coolidge*, 403 U.S. at 466. As explained by this Court, the "plain view" doctrine applies in situations in which "the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character." *Id.* at 465 (citations omitted).

Where police have no warrant, however, but the initial intrusion is lawful, the seizure of items that come into plain view is also legitimate under recognized exceptions to the warrant requirement. *Horton*, 496 U.S. at 135. According to Justice Stewart, writing the plurality opinion in *Coolidge*, plain view alone is never enough to justify a warrantless seizure of evidence. *Coolidge*, 403 U.S. at 468. In addition, a warrantless seizure is valid under the doctrine where (1) the officers are lawfully in a position to observe the items, (2) the discovery of the items is "inadvertent," and (3) it is immediately apparent to the officers that the items are evidence of a crime, contraband, or otherwise subject to seizure." *Coolidge*, 403 U.S. at 466-469. *See Horton*, 496 U.S. at 134-138 (where Justice Stevens writing for the majority held that "inadvertence" is not a necessary condition but affirmed the other conditions set forth by Justice Stewart).

The Agents cannot show that the Media were (1) lawfully on the Bergers' Ranch or inside their residence to observe any items or record conversations or, (2) that what was "immediately apparent" to them was "evidence of a crime, contraband, or otherwise subject to seizure." *Coolidge*, 403 U.S. at 466-69. Thus, the plain view exception cannot apply. The Media's presence and conduct were "outside the judicial process, without prior approval by judge or magistrate, [were] *per se* unreasonable under the Fourth Amendment . . . ." *Coolidge*, 403 U.S. at 454-55; *Katz*, 389 U.S. at 357. The Agents' attempted reliance on plain view alone validates the concern of Justice Stewart in *Coolidge* when he issued the admonishment that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." *Coolidge*, 403 U.S. at 466. Of course, here there was never an intent that the Media would search for or seize evidence or contraband. They were making a television show.

6. Allowing The Media To Videotape And Record At The Berger Ranch Converted The Search Into An Exploratory Search And The Particularized Warrant Issued Here Into A General Warrant And A Writ Of Assistance

This Court has consistently held that absent exigent circumstances or consent, the entry into a home to conduct a search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. *Steagald v. United States*, 451 U.S. 204, 220 (1981). Protecting the sanctity of the home from the indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment. *Payton*, 445 U.S. at 583. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that

threshold may not reasonably be crossed without a warrant." *Payton*, at 590.[40]

Law enforcement conduct amounted to an unreasonable exploratory search and invasion of privacy in *Walter v. United States*, 447 U.S. 649, 652-653 (1980). This Court's reasoning was based on the opinion by Justice Stewart in *Stanley v. Georgia*, 394 U.S. 557, 569 (1969):

> Even in the much-criticized case of *United States v. Rabinowitz*, 339 U.S. 56, the Court emphasized that "exploratory searches . . . cannot be undertaken by officers with or without a warrant." (citation omitted). This record presents a bald violation of the basic constitutional rule. To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

Walters, 447 U.S. at 653 (citing *Stanley*, 394 U.S. at 571-72).

The unbridled power of the Government crossed the threshold of the Bergers' residence with the Media without a search warrant, without exigency, and without law enforcement purpose. The warrant was used to authorize a Media search of the Ranch and all of its structures. The search warrant was converted by the Agents into both a general warrant and a writ of assistance for the Media.

The scope of the Media's activity could not be controlled and the Media videotaped and recorded every image and sound that the equipment captured. Every sound and image seized by the Media violated the Bergers' Fourth Amendment rights. *See Silverman*, 365 U.S. at 509; *Berger*, 388 U.S. at 50-52, 58-59.

---

[40] The evil the Amendment was designed to prevent was broader than the abuse of the general warrant – unreasonable searches and seizures – without a warrant. *See Id.* at 585 n.23. The prohibition against general searches and warrants is based on privacy concerns, which are not implicated when law enforcement has a lawful right of access to an item in plain view and seizes it without a warrant. *Horton v. California*, 496 U.S. 128 (1990).

II. QUALIFIED IMMUNITY DOES NOT SHIELD LAW ENFORCEMENT FROM LIABILITY FOR VIOLATING CLEARLY ESTABLISHED FOURTH AMENDMENT LAW BY ALLOWING THE MEDIA TO ENTER, OBSERVE, VIDEOTAPE AND RECORD THE EXECUTION OF A SEARCH WARRANT ON PRIVATE PROPERTY

A. The Qualified Immunity Standard

Government officials are entitled only to qualified, not absolute, immunity in *Bivens* actions for damages. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987); *Gomez v. Toledo*, 446 U.S. 635, 639-41 (1980) (the burden of pleading is on the defense). *See Kalina v. Fletcher*, ___ U.S. ___, 118 S.Ct. 502 (1997).[41] Under the qualified immunity standard, government officials performing discretionary functions are not immune from liability for civil damages if their conduct violated a "clearly established statutory or constitutional right of which a reasonable person would have known." *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Anderson*, 483 U.S. at 639.

The threshold legal question in a qualified immunity analysis is whether the right allegedly violated is a Constitutional right, as explained by this Court in *Siegert v. Gilley*, 500 U.S. 226 (1991):

> a necessary concomitant to the determination of whether the constitutional right asserted by plaintiff was "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

Id. at 232; *County of Sacramento v. Lewis*, ___U.S.___, 118 S.Ct. 1708, 1714 n.5 (1998).

---

[41] Prosecutors who are sued under *Bivens* for conduct not involving advocacy are limited to a qualified immunity defense. *Id.* at 507 (citing *Burns v. Reed*, 500 U.S. 478, 492-96 (1991) (providing legal advice to law enforcement during pretrial investigation); *Buckley v. Fitzsimmons*, 509 U.S. 259, 276-78 (1993) (holding a press conference)).

B. Fourth Amendment Rights Were Violated

As argued above, the conduct at issue violated the Fourth Amendment. The Ninth Circuit properly addressed the threshold question in this case. P.A. 9a-13a. Reversing the district court, the Ninth Circuit held that the Bergers correctly alleged that the Agents "are individually liable for damages caused by their active participation in the commercial television/law enforcement enterprise conducted at the Bergers' ranch" resulting in an unreasonable search and seizure. P.A. 9a-10a.[42] The Bergers have properly established the violation of a Constitutional right because "to be free from official conduct in contravention of the Fourth Amendment – is a federally protected right." *Bivens*, 403 U.S. at 400.[43]

The threshold question was properly addressed in a factually similar case holding a Secret Service agent liable for allowing a CBS camera crew to join a search in a private apartment in March 1992. *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 366-67 (E.D.N.Y. 1994) ("*Ayeni I*"). In that case, the

---

[42] In contrast, the Fourth Circuit, sitting *en banc* in *Wilson v. Layne*, 141 F.3d 111 (4th Cir. 1998) (consolidated here) ignored the threshold analysis and refused to "address whether the officers' conduct was constitutional or appropriate. . . . " *Id.* at 118. In a carefully reasoned discussion of "the core values of the Fourth Amendment," Circuit Judge Murnaghan dissented on the grounds that it was unreasonable for police to allow reporters into the Wilsons' private home without their permission and to photograph them in a state of undress and that the majority ruling converted qualified immunity into absolute immunity. *Id.* at 119-133 (Motz, J., joining in the dissent).

[43] This Court in *Bivens* remarked that, like here, the "Government appears not ready to concede this point." *Id.* at 400 n.3. To confirm the clearly established fundamental nature of the Fourth Amendment right alleged here, this Court noted Lasson's observation concerning Madison's version of the Fourth Amendment was introduced to the House, "the language of the proposal did not *create* the right to be secure from unreasonable search and seizures but merely stated it as a right which already existed." *Id.* (quoting, N. Lasson, *History and Development of the Fourth Amendment to the United States Constitution*, 100 n.77 (1937)).

district court conducted a well-reasoned analysis of the Fourth Amendment and concluded that,

> [i]t would be, arguably, grossly unreasonable for a government agent not to have known that the presence of private persons he invited in, so that they could titillate and entertain others was beyond the scope of what was lawfully authorized by the warrant.

Id. at 368.[44] The district court's decision was affirmed on appeal in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) ("*Ayeni II*"), where the Second Circuit added its admonishment that "[a] private home is not a soundstage for law enforcement theatricals." *Id.* at 686; *see U.S. v. Sanusi*, 813 F. Supp. 149, 154-59 (E.D.N.Y. 1992).

The Fourth Circuit affirmed that the correct threshold analysis was conducted in *Buonocore v. Harris*, 65 F.3d 347, 353-57 (4th Cir. 1995) ("*Buonocore I*"), when it refused interlocutory appeal of the denial on summary judgment of a deputy's qualified immunity defense. That case involved a search in November 1992 where law enforcement obtained a federal search warrant for illegal weapons but one of them, a deputy sheriff, invited the security officer for Buonocore's employer to search for allegedly stolen company equipment. *Id.* at 350. In condemning the private search that took place under the imprimatur of the warrant, the district court held that "we have no doubt that the Fourth Amendment prohibits government agents from allowing a search warrant to be used to facilitate a private individual's independent search of another's home for items unrelated to those specified in the

---

[44] Judge Jack B. Weinstein characterized the Secret Service agent's conduct as "the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that of another." *Id.* at 368. Judge Weinstein added that "CBS had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record. The images, though created by a camera, are a part of the household; they could not be removed without permission or official right." *Id.*

warrant." *Id.* at 356.[45] The Fourth Circuit's rationale was based on an examination of common law concepts leading to ratification of the Fourth Amendment to proscribe general warrants and writs of assistance. *Id.* at 353-354.[46]

Fourth Amendment rights were also implicated in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) ("*Bills I*"), when, in August 1987, police invited a company security officer into a residence to conduct a private search and photograph possibly stolen company equipment that were not described in the search warrant. *Id.* at 702-705.[47] Concluding, however, that the determination of whether allowing a private party during a search unreasonably exceeded the scope of the warrant to apply the qualified immunity defense was a jury issue, the Sixth Circuit reversed the directed verdict for the defense and remanded the case. *Id.* at 705. On appeal after trial where the jury returned a verdict for the defense, the Sixth Circuit distinguished *Ayeni II*, arguing that the Second Circuit failed "to define narrowly the right allegedly violated, instead

---

[45] The *Ayeni* and *Buonocore* decisions contrast markedly with decisions from the district court and Eighth Circuit. There was no threshold analysis in *Parker v. Clarke*, 905 F. Supp. 638, 642 (E.D. Mo. 1995) ("*Parker I*"), as there were no allegations of "state action." The District Court found that plaintiffs had not alleged any facts showing concerted action between the press and police and also failed to offer any evidence of "any affirmative agreement." *Id., aff'd in part and rev'd in part sub nom. Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997) ("*Parker II*").

[46] *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-670 (1995) (O'Connor, J., dissenting) (noting that "[p]rohibition of the general warrant was part of a larger scheme to extinguish general searches categorically." (citation omitted)). The Fourth Circuit affirmed the district court's finding that the private search was unreasonable in violation of Fourth Amendment rights. *Buonocore v. Harris*, 134 F.3d 245, 251 (4th Cir. 1998) ("*Buonocore II*") (affirming denial of qualified immunity defense).

[47] The Sixth Circuit affirmed that the security officer's presence was not justified under 18 U.S.C. §3105, as discussed, *infra*. *Id.* at 702.

describing the violation in abstract terms as a Fourth Amendment right to privacy," *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) ("*Bills II*"), and misstated *Ayeni* as holding that officers "may not exploit their role [in executing warrants] for commercial gain." *Id.* at 603.

The Agents contend that the Fourth Amendment does not apply and suggest that even if the Amendment did apply the presence of the Media is justifiable. *See supra* at section I.B. The Agents also rely on old state cases where the press obtained police information from public sources;[48] or where the conduct challenged involves state not federal officials and state law claims, not the Fourth Amendment.[49] *Bivens*, 403 U.S. at 400. Here, as noted above, the Constitution has been violated by the conduct of the Agents.

C. Fourth Amendment Rights Were Clearly Established

The second prong of the qualified immunity analysis requires showing that the constitutional right on which the claim for relief is based was clearly established at the time of the alleged violation. *See Harlow*, 457 U.S. at 818.[50] Qualified

---

[48] For example, the Agents postulate that the Fourth Amendment does not apply where law enforcement do not act improperly until *after* executing a valid search or by *later* giving publicity to the press. Pet. 31-32. This view presumes that the Agents acted independently of the Media in time and place, which they did not. The cases cited are thus inapposite. *See Baker v. Howard*, 419 F.2d 376, 377 (9th Cir. 1969) (police report given to radio station after being written and no decision made whether common law privacy claim was alleged).

[49] *See York v. Story*, 324 F.2d 450, 455-56 (9th Cir. 1963) (due process violation alleged under 14th Amendment when police took pictures of victim and circulated among themselves); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (newspaper published name of rape victim after obtaining name from public document). Pet. 32.

[50] In *Harlow*, this Court held that senior Presidential aides were only entitled to qualified immunity under an objective reasonableness test in order to "provide no license to lawless conduct." *Id.* at 818-819. The Court

immunity is a question of law, not "legal facts." *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).[51]

The clearly established standard applicable to qualified immunity cases was recently reaffirmed in *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219 (1997), when this Court clarified the "fair warning" standard applicable to criminal statutes.[52] Stating that the clearly established standard is the adaptation of

---

reasoned that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent official should know the law governing his conduct . . . if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Id.* at 818-819.

[51] In *Mitchell*, Forsyth sued the Attorney General who, at the request of the President, authorized a warrantless wiretap to investigate threats to national security by Forsyth and his anti-war group. *Id.* at 532-536. The basis of the suit was that one year after the wiretap was placed, warrantless national security wiretaps were held to be unlawful. *Id.* at 515-516 (citing *United States v. United States District Court*, 407 U.S. 297, 322-323 (1972)). This Court, however, ruled that the Attorney General was entitled to qualified immunity because the unlawfulness of warrantless national security wiretaps was not clearly established at the time the wiretap was placed on the grounds that they had been permitted since President Roosevelt first authorized wiretaps of suspected subversives in the 1940's. *Mitchell*, 472 U.S. at 532-536. Petitioners' reliance on *Mitchell* for the proposition that harboring the Media's wiretap was lawful is inapposite. Pet. 40.

[52] In that case, the conviction of a former state judge for sexually assaulting five women in violation of their due process rights under 18 U.S.C. §242 was affirmed on appeal. *Id.* at 1223. The Sixth Circuit, sitting *en banc*, vacated the conviction on the grounds that the constitutional right at issue had not previously been identified by this Court in a case with fundamentally similar facts and, thus, did not give "fair warning" of a violation. *Id.* The combined standard applied by the Sixth Circuit was substantially higher than the clearly established standard applied to qualified immunity based on its interpretation of *Screws v. United States*, 325 U.S. 91 (1945) (plurality opinion). *Id.* at 1225. The Sixth Circuit was reversed for applying too restrictive a standard.

fair warning in the civil context,[53] this Court noted that "the touchstone [of fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 1225-1227; *see Anderson*, 483 U.S. at 639.[54] While recognizing the inherent difficulty of giving fair warning for a due process violation under 18 U.S.C. §242 where the statute does not define the offense, the Court acknowledged that,

> this constitutional difficulty does not arise when the accused is charged with violating a "right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them."

Id. at 1225 (citing *Screws v. United States*, 325 U.S. 91, 104 (1945)).[55]

As to decisions interpreting the Constitution or laws of the United States, this Court made clear that its own prior decisions have never been required. *Id.* at 1226. Nor does this Court require precedents that applied the right at issue to a factual situation that is "fundamentally similar" at the level of

---

[53] "Fair warning" according to Justice Holmes, should be "in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *Lanier*, 117 S.Ct. at 1224 (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (" 'The . . . principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' ").

[54] A statutory example of "fair warning" is 18 U.S.C. §3105 which explicitly limits the service and execution of federal search warrants to authorized officers and prohibits the presence of private persons, "except in aid of the officer on his requiring it," and only in the presence of the officer executing the warrant. *See infra* at section II.C.2.

[55] "But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " *Lanier*, 117 S.Ct. at 1227 (citing *Anderson*, 483 U.S. at 640).

specificity meant by the Sixth Circuit. *Id.* at 1227.[56] At a minimum what is required is that:

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in light of the pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640 (internal citation omitted).[57] *See Mitchell*, 472 U.S. at 535 n.12.[58]

In applying the rule to a qualified immunity analysis in actions under 42 U.S.C. §1983 and *Bivens*, this Court noted that "we have referred to decisions of the Courts of Appeals when enquiring whether the right was 'clearly established.' " *Lanier*, 117 S.Ct. at 1226; *Mitchell*, 472 U.S. at 533; *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (treating Court of

---

[56] Noting to the contrary that this Court upheld convictions under 18 U.S.C. §241 or §242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct at issue violated Constitutional rights. *Id.*

[57] This Court in *Anderson* explained that the inquiry of the objective reasonable test of *Harlow* in a *Bivens* action against an FBI agent for a warrantless search was whether a reasonable officer could have believed that the search comported with the Fourth Amendment even though it actually did not and, reversed the Court of Appeals which granted summary judgment for the agent. *Id.* at 645.

[58] The Agents take *Procunier v. Navarette*, 434 U.S. 555, 562, 566 (1978), out of context as stating the rule for qualified immunity analysis (Pet. 34), and to lament that they "cannot be expected to predict the future course of constitutional law." Pet. 41. The remainder of the statement was omitted that an official cannot be expected to predict the future, "but he will not be shielded from liability if he acts 'with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.' [citation omitted]." *Id.* at 567.

Appeals decision as "relevant authority" that must be considered as part of qualified immunity inquiry).

1. The Agents Violated Clearly Established Fourth Amendment Rights

The law was clearly established at the time of the Berger search in March 1993 based on the express terms of the Fourth Amendment and the decisions interpreting the search warrant requirement. *Lanier*, 117 S.Ct. at 1225 (citing *Screws*, 325 U.S. at 104). *See supra* at section I. Petitioners knew or should have known that private parties – namely, the Media – were prohibited from the execution of the search warrant. Agent Scrafford testified that he told the Media that they should not enter the Berger Ranch during the search but allowed them to enter nonetheless. R. 8/7:37, 115. *See Bivens*, 403 U.S. at 394 n.7.

There were also relevant Court of Appeals decisions on point interpreting the Fourth Amendment. In *Ayeni II*, the Second Circuit affirmed that the Fourth Amendment rights violated here were clearly established in March 1992, one year *before* the Berger search. *Ayeni v. Mottola*, 35 F.3d 680, 684 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).[59] In conducting the second prong of the qualified immunity analysis, the Second Circuit found that an "objectively reasonable officer could not have concluded that inviting a television crew – or any third party not providing assistance to law enforcement – to participate in a search was in accordance with Fourth Amendment requirements." *Id.* at 686 (referring to the standard in *Anderson*, 483 U.S. at 640, that "in the light of pre-existing

---

[59] In *Ayeni I*, the district court (Weinstein, J.) noted that the conduct of the Secret Service agent who allowed a CBS camera crew to videotape and record a search in the Ayeni's apartment was "so far from then well established acceptable constitutional behavior that no case law precedent was needed to alert him to the fact that the execution of a warrant for the benefit of private persons violated the Constitution." *Ayeni I*, 848 F. Supp. at 368.

law the unlawfulness must be apparent."). Denial of the agent's qualified immunity defense was affirmed on the ground that "a private home is not a soundstage for law enforcement theatricals." *Ayeni II*, 35 F.3d at 686.[60]

In addition, the Fourth Circuit held that in November 1992, the Fourth Amendment prohibition against the presence of private parties during searches was clearly established. *Buonocore v. Harris*, 134 F.3d 245, 251 (4th Cir. 1998) ("*Buonocore II*") (affirming denial of qualified immunity defense). *See Buonocore I*, 65 F.3d at 356 (in November 1992 it was "clearly established" that the Fourth Amendment prohibits government agents from using a search warrant to facilitate a private telephone company_ employee's independent search of another's home for items not specified in the warrant).[61]

The Agents contend that district court decisions have upheld their conduct. Pet. 35-39. The older lower court and unpublished decisions they rely on, however, are not "relevant

---

[60] The Agents' reliance on *Mitchell v. Forsyth*, 472 U.S. 511 (1985), for the proposition that the Ninth Circuit should not have relied on *Ayeni* and *Buonocore* is inapposite. As expressed by the Ninth Circuit under clearly established Fourth Amendment jurisprudence, "even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible" to invite the press "into the home of the person searched." J.A. 11a (citing *Ayeni II*, 35 F.3d at 686; *Buonocore I*, 65 F.3d at 356; 18 U.S.C. §3105).

[61] *See Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1981) (allowing the media to trespass would amount to a "general warrant equivalent to the writs of assistance which were so odious to the American colonists."); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (the search occurred in July 1991, one year before the Berger search, and Sixth Circuit justified the media's presence during a search on the grounds that the search warrant authorized photography and videotaping); *Bills v. Aseltine*, 958 F.2d 697, 704 (1992) (the issue of whether the search was reasonable was left to the jury and the person who engaged in the private search was not named in the §1983 action).

authority." *See Elder*, 510 U.S. at 516.[62] These cases have no constitutional force and effect as they did not recognize the Fourth Amendment privacy right which this Court has clearly upheld in superseding decisions.[63] The Ninth Circuit rejected reliance on these cases as they did not involve the Media "as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." P.A. 13a.

2. The Agents Violated Explicit Federal Statutes Embodying The Constitutional Prohibition Limiting Their Authority To Execute Search Warrants

In his scholarly opinion in *Ayeni v. CBS Inc.*, 848 F. Supp. 362, 367 (E.D.N.Y. 1994) ("*Ayeni I*"), Judge Weinstein looked to federal statutes as well as case law in holding that the Fourth

---

[62] *See Higbee v. Times-Advocate, Inc.*, 5 Media L. Rep. (BNA) 2372 (S.D. Ca. Jan. 9, 1980) (turned on a restrictive characterization of the privacy right violated by the intrusion of the media under a warrant); *Moncrief v. Hanton*, 10 Media L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) (erroneously held that a constitutional wrong required violation of a *non*-4th Amendment privacy right (*e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973)); *Prahl v. Brosamle*, 295 N.W.2d 768, 774 (Wis. Ct. App. 1980) (issue was limited to whether a reasonable search and seizure, without more, is made unreasonable when the media shows up to film where there is no agreement with or participation of law enforcement); *Avenson v. Zegart*, 577 F. Supp. 958, 962 (D. Minn. 1984) (Fourteenth Amendment claim for equal protection not valid constitutional violation where invidious, class-based discrimination was not and could not be alleged).

[63] *See Winston v. Lee*, 470 U.S. 753, 758-760 (1985) (recognizing that the Fourth Amendment protects expectations of privacy); *See e.g.*, *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (Fourth Amendment protection against unreasonable searches and seizures applies in civil cases even where no invasion of privacy is alleged). *See also Woodward v. Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992) (a district court decision will not ordinarily "clearly establish" the law even of its own circuit); *Fox v. Acadia State Bank*, 937 F.2d 1566, 1577 (11th Cir. 1991) (a district court is not bound by another district court's decision).

Amendment prohibition against the law enforcement-media theatrical that occurred at the Ayeni apartment was clearly established in March 1992. In particular, he looked to 18 U.S.C. §3105, which limits who may serve and execute a search warrant, providing that,

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it,* he being present and acting in its execution.

18 U.S.C. §3105; *Ayeni I*, 848 F. Supp. at 367 (emphasis added).

Judge Weinstein noted that §3105 "was enacted as a codification of the Fourth Amendment requirements for lawful searches and seizures" and that "the wording was used in earlier statutes governing search warrants." *Ayeni I*, 848 F. Supp. at 367.[64] He reasoned that "Congress – as well as the courts and the President – has the power and the responsibility to interpret the Constitution in legislating" and because "Courts assume that statutes effectuating or executing the constitutional mandates were adopted with this obligation in mind", he concluded that "[s]tatutes as well as case law can thus be relied upon in determining whether a constitutional right is clearly established." *Id. See Swate v. Taylor*, 12 F. Supp. 2d 591, 596 (S.D. Tex. 1998) (Congress passed §3105 in 1917 reaffirming the proscription against third persons from accompanying federal officers when not assisting the officer in execution of the search warrant).[65]

---

[64] Citing to The National Prohibition Act, Title II, §2, 41 Stat. 305, 308 (1919) and The Espionage Act, Title XI, §7, 40 Stat. 217, 229 (1917) (repealed 1948). The ancient nature of the prohibition embodied in §3105 is delineated in the Amicus Brief filed concurrently by NASCAT at pp. 24-26.

[65] In *Ayeni II*, Chief Judge Jon O. Newman noted that the prohibitions of §3105 may be considered in determining "reasonableness" under the Fourth Amendment as indicated by the similar treatment courts

Section 3105 has been strictly applied in light of its constitutional basis. Thus, in *Ayeni I*, because the CBS camera crew was not requested by the Secret Service to aid in the execution of the search warrant at the Ayeni apartment, Judge Weinstein considered a violation of §3105 as further support that the presence of third parties for private purpose during a law enforcement activity violated a Fourth Amendment prohibition that was clearly established before March 1992. *Id. See Ayeni II*, 35 F.3d at 687.[66]

Other courts have also strictly construed §3105. P.A. 10a-11a. *See Swate*, 12 F. Supp. 2d at 593 (methadone clinic doctor's clearly-established constitutional right to be free from government intrusion violated when federal drug agent acting under authority of search warrant allowed local television crew into clinic); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982) (a state drug enforcement officer asked to assist in the execution of federal drug search warrant); *United States v. Clouston*, 623 F.2d 485, 486-487 (6th Cir. 1980) (en banc) (telephone company employees were authorized by the search warrant to help identify stolen company property). *See also United States v. Gambino*, 734 F. Supp. 1084, 1091 (S.D.N.Y. 1990) (confidential informant assisting search); *United States v. Schwimmer*, 692 F. Supp. 119, 126-127 (E.D.N.Y. 1988) (a private computer expert was authorized by the search warrant to locate computer files); *United States v. Peifer*, 474 F. Supp. 498, 503 (E.D. Pa. 1979) (EPA expert authorized to obtain and test water samples in water contamination investigation).[67] In

---

have accorded the requirements of §3109 the "knock and announce" statue. *Ayeni v. Mottola*, 35 F.3d 680, 687 n.9 (2d Cir. 1994).

[66] *See* Title 18, Sections 3109 (knock and announce requirement limits the use of force to enter a private dwelling); 2234 (criminalizes willful exceeding of search warrant authority); 2236 (criminalizes the warrantless search of a private dwelling); and Rule 41, Federal Rules of Criminal Procedure, regulates the issuance and execution of search warrants and provides an additional basis for interpreting the Fourth Amendment's reasonableness requirement.

[67] Other federal appellate cases illustrate the consequences of allowing unauthorized persons during searches. *See United States v.*

every case and those cited by the Government Agents to support their proposition that the presence of third parties during a search is lawful, the private party was specifically present and authorized to assist authorized law enforcement to identify or locate property in which the third party had an interest.

Nor can the Agents justify the presence of the Media under the Department of Justice ("DOJ") policy excerpt attached to their brief, because it would endanger or prejudice a person and it was proscribed by law.[68]

D. Damages Are Appropriate For Constitutional Violations.

An action for damages may offer the only realistic remedy to vindicate constitutional violations by federal officials.

Sanchez, 509 F.2d 886, 889 (6th Cir. 1975) (explosives found during warrantless search by federal Alcohol, Tobacco and Firearms agent suppressed when he entered premises with state police under search warrant for narcotics only); *United States v. Warren*, 550 F.2d 219, 225 (5th Cir. 1977) (evidence found during warrantless search by federal Drug Enforcement Agency agents suppressed based on unauthorized boarding of ship under Coast Guard authority only to make safety inspections).

[68] There are other restrictions on DOJ personnel in relation to the Media ignored in petitioners' brief. DOJ personnel are specifically prohibited from disclosing private facts and confidential information to the media during a confidential investigation, especially "subjective observations" about the character of persons under investigation, or references to investigative procedures, witnesses or evidence, or any opinion as to the person's guilt, where release "tends to create dangers of prejudice without serving any law enforcement function" and "could reasonably be expected to be disseminated by means of public communication." *See* 28 C.F.R. §50.2(b)(1)-(6). The DOJ personnel are under an "obligation to preserve the privacy rights of our citizens, even though they may be under investigation for violation of the criminal laws." *See Department of Justice Manual*, 1-7.001 at 1-285 (1990-1 Supp.) ("Favoritism should be shown to no member of the media"); 1-7.000 (1993 Supp.). The Privacy Act imposes criminal sanctions for the willful disclosure of such information without written consent or court order. *See* 5 U.S.C. §552a. *See* R. 8/5.

Harlow, 457 U.S. at 818; *Butz v. Economou*, 438 U.S. 478, 506 (1978).[69] Petitioners' contention that state common law

---

[69] The majority of this Court in *Bivens* noted that "it is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court . . . assuming Bivens' innocence of the crime charged, the 'exclusionary rule' is simply irrelevant. For people in Bivens' shoes, it is damages or nothing." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring). *See also* H. H. Rossbacher, T. W. Young, N. E. Nishimura, "*An Invasion Of Privacy: The Media's Involvement In Law Enforcement Activities*," 6 Journal of Financial Crime No. 3, 240 (Henry Stewart, London, 1998) (hereafter "*An Invasion Of Privacy*").

In the *Sanusi-Ayeni* cases Judge Weinstein noted that the Secret Service had defied the U.S. Attorney and taken CBS into the Ayenis' home against the U.S. Attorney's instructions. *United States v. Sanusi*, 813 F. Supp. 149, 161 (E.D.N.Y. 1992). It was later discovered in the *Ayeni* civil case that the Secret Service had valued the benefit of good publicity from CBS so highly that it would risk tainting the evidence to be found in the search by the illegality of its conduct. *An Invasion Of Privacy*, at n.24. It was also discovered that CBS had accompanied the Secret Service on multiple searches of other homes. The exclusionary rule does not appear to deter this conduct as it was intended to do. The rule was enacted to prohibit law enforcement abuse of the warrant and "calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citation omitted). Two press lawyers have published their advice balancing the small risk of being sued against the large profits to be made from syndicated footage of citizens' humiliation:

> *Finally*, many of those who are filmed while being arrested or searched are eventually charged with criminal activity. Those who are convicted or plead guilty are not likely to sue; if they do, they are unlikely to recover significant sums.

Rex S. Heinke & Susan S. Edelman, *Police and Emergency "Ride-Alongs" – Is Viewer Excitement Worth the Risk?* ENT. L. REP. (Dec. 1995) at 3. This is the cynical attitude to the individual's constitutional rights manifested by the press in these cases.

remedies "or perhaps the Due Process Clause" are sufficient is without merit. Pet. 29-32.[70] According to this Court in *Bivens*, "it is well-settled that where legal rights are invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bivens*, 403 U.S. at 396 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).[71]

CONCLUSION

For the foregoing reasons respondents Paul W. Berger and Erma R. Berger respectfully submit that the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

JAY F. LANSING
MOSES LAW FIRM
The Terrace – Penthouse
300 North 25th Street
P.O. Box 2533
Billings, Montana 59103
(406) 248-7702

Counsel for Respondents

HENRY H. ROSSBACHER*
NANCI E. NISHIMURA
TRACY W. YOUNG
DAVID F. DESMOND
MY T. HUYNH
ROSSBACHER & ASSOCIATES
Citibank Center
444 South Flower Street,
Suite 2100
Los Angeles, California
90071-2922
(213) 895-6500

**Counsel of Record*

---

[70] A due process claim is not recognized by this Court under the "more specific provision" rule. *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion of Rehnquist, C.J.) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). *See also City of West Covina v. Perkins*, No. 97-1230, 1999 U.S. LEXIS 507, *20 (Jan. 13, 1999) (Thomas, J., concurring) (citing *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975)).

[71] The basis for this Court's rationale was that the interests protected by state trespass laws "may be inconsistent or even hostile" with those protected by the Fourth Amendment. *Id.* at 394.

No. 97-1927

Supreme Court, U.S.
FILED
MAR 4 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, et al.,

Petitioners,

v.

PAUL W. BERGER, et ux., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR RESPONDENTS CABLE NEWS NETWORK LP, LLLP, TURNER BROADCASTING SYSTEM, INC., ROBERT RAINEY, DONALD HOOPER, AND JACK HAMANN IN SUPPORT OF PETITIONERS

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK LP, LLLP
One CNN Center
P.O. Box 105366
Atlanta, Georgia 30348

P. CAMERON DEVORE*
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC STAHL
DAVID BOWMAN
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150

*Counsel of Record

Counsel for Respondents Cable News Network LP, LLLP, Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25PP

AMENDED RULE 29.6 LISTING

Due to a business restructuring effective January 1, 1999, Cable News Network, Inc. has changed its name and its legal relationship with Turner Broadcasting System, Inc ("TBS"). Cable News Network, Inc. has become a limited liability limited partnership, now known as "Cable News Network LP, LLLP" ("CNN"). The general partner of CNN is TBS, and the limited partner is CNN Investment Company, Inc. Neither TBS nor CNN has any nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

ARGUMENT 1

A. The Agents' Several Entries into the Bergers' Home Were Consensual and Reasonable 2

1. The Agents' Consensual Entry Into the Bergers' Home Was Objectively Reasonable 4

2. The Bergers' Consent Was Not the Product of Any Coercive Measures 7

B. The Fourth Amendment Was Not Violated By the Absence in the Warrant of Specific Authorization for CNN to Observe the Agents' Search 8

C. The Bergers' Ignorance of the Fact They Were Being Recorded Is Not Constitutionally Relevant 12

D. CNN's Presence Did Not Convert the Search Into a Prohibited General Warrant or Writ of Assistance 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abel v. United States, 362 U.S. 217 (1960) 9

Alderman v. United States, 394 U.S. 165 (1969) 12, 13

Andresen v. Maryland, 427 U.S. 463 (1976) 9, 10, 17

Berger v. New York, 388 U.S. 41 (1967) 12, 13

Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) 14

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 3

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 14

Dalia v. United States, 441 U.S. 238 (1979) 8, 11

Florida v. Bostick, 501 U.S. 429 (1991) 3

Florida v. Jimeno, 500 U.S. 248 (1991) 3, 4

Gouled v. United States, 255 U.S. 298 (1921) 13

Hoffa v. United States, 385 U.S. 293 (1966) 15, 16

Horton v. California, 496 U.S. 128 (1990) 11

Irvine v. California, 347 U.S. 128 (1954) 12

Johnson v. United States, 333 U.S. 10 (1948) 9

Katz v. United States, 389 U.S. 347 (1967) 15

Lopez v. United States, 373 U.S. 427 (1963) 15, 16

Marron v. United States, 275 U.S. 192 (1927) 9

Maryland v. Wilson, 117 S. Ct. 882 (1997) 19

Michigan v. Summers, 452 U.S. 692 (1981) 11

Payton v. New York, 445 U.S. 573 (1980) 9, 18

TABLE OF AUTHORITIES – Continued

Page

Pennsylvania v. Mimms, 434 U.S. 106 (1977) 4

Richards v. Wisconsin, 520 U.S. 385 (1997) 11

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 3

Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603) 18

Silverman v. United States, 365 U.S. 505 (1961) 12, 13

Soldal v. Cook County, Ill., 506 U.S. 56 (1992) 1

Tennessee v. Garner, 471 U.S. 1 (1985) 18

United States v. Leon, 468 U.S. 897 (1984) 10

United States v. Mejia, 953 F.2d 461 (9th Cir. 1991).. 5, 6, 7

United States v. Pena, 920 F.2d 1509 (10th Cir. 1990) 5, 6, 7

United States v. Rubio, 727 F.2d 786 (9th Cir. 1983) 15

United States v. Sierra-Hernandez, 581 F.2d 760 (9th Cir. 1978) 5, 6, 7

United States v. Stapleton, 10 F.3d 582 (8th Cir. 1993) 5, 7

United States v. Stowe, 100 F.3d 494 (7th Cir. 1996) 11

United States v. United States Dist. Court, 407 U.S. 297 (1972) 9

United States v. Ventresca, 380 U.S. 102 (1965).....10, 11

United States v. White, 401 U.S. 745 (1971) ... 14, 15, 16, 17

Wong Sun v. United States, 371 U.S. 471 (1963)..... 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

18 U.S.C. § 3105 1

ARGUMENT

Respondents Cable News Network LP, LLLP, TBS, Robert Rainey, Donald Hooper, and Jack Hamann (collectively "CNN") do not take issue with Paul and Erma Berger's restatement of the bedrock constitutional " 'right of a man to retreat into his own home' and there be free from unreasonable governmental intrusion." Resp. Br. at 13 (quoting *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992)). However, the issue[1] here is whether reasonable government intrusion – supported by probable cause and a valid, specific warrant in the case of the open fields search, and Berger's consent in the case of the entry in the home – is made unreasonable merely as a result of permitting members of the news media to ***observe***.[2] Respectfully, CNN submits the answer is no.

Below, CNN addresses the issues the Bergers raise in their brief. First, Berger's consent to the Fish and Wildlife Service ("FWS") agents' entry to his home was voluntary and their entry objectively reasonable. Second, the absence of any mention of CNN in the warrant is constitutionally irrelevant; rather, the reasonableness standard

---

[1] The issue here ***is not*** whether government may "authorize unlimited and uncontrolled access to private parties." Resp. Br. at 20.

[2] The claim that CNN searched for or seized ***anything*** is devoid of any factual support. There is ***no*** evidence that CNN "roam[ed] throughout the ranch and its buildings," and the agents and CNN ***do not*** argue CNN was "authorized to search and seize not merely evidence, but anything of interest." *Id.* at 21, 18. CNN remained at all times under the immediate supervision of the agents, observing their execution of the warrant. The fact that CNN did not search for or seize anything also entirely undercuts the Bergers' reliance on 18 U.S.C. § 3105 which limits who may "serve" a federal warrant, not who may ***witness*** such service.

affords the proper measure. Third, the Bergers' unawareness that their knowing conversations with the agents were being recorded does not make reasonable an otherwise unreasonable privacy expectation. Last, in determining the constitutionality of CNN's presence as a mere observer to the warrant's execution, the specter of pre-colonial general warrants and writs of assistance is inapposite.

A. The Agents' Several Entries into the Bergers' Home Were Consensual and Reasonable.

The Bergers do not contest that the open fields doctrine applies to the agents' search of their ranchlands and outbuildings. Because the Fourth Amendment did not protect any subjective expectation of privacy of the Bergers in the open fields of their 75,000-acre ranch, the Fourth Amendment was not violated by any conduct occurring there, including the agents granting CNN permission to observe the search of the ranchlands and outbuildings.[3] CNN Br. at 10-20. Consequently, the Bergers press their Fourth Amendment claims on the basis of the agents' entry into the Bergers' home, even though that entry undisputedly resulted in no search or seizure. R. 4,

[3] The Bergers do suggest that "[o]btaining the warrants was a procedural acknowledgment of the expectations of privacy to be protected." Resp. Br. at 15. However, as Magistrate Judge Anderson held in the criminal proceedings against Mr. Berger, the agents did not need a warrant to search the Bergers' open fields. R. 5, Ex. G, at 4-5. The prudent procurement of a warrant does not make an otherwise unrecognized privacy expectation objectively reasonable. (The excerpts of record ("R.") refer to the two volumes submitted by the Bergers in their appeal in *Berger v. Hanlon*, 9th Cir. Cause No. 96-35261. The initial reference is to the tab number within the record.)

Ex. B at 108:11-12. However, this argument fails because Berger consented to the entry into his home.

"The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The Court has "long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Id.* at 250-51; *accord Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) ("a search authorized by consent is wholly valid"). A request for permission to search does not implicate the Fourth Amendment "so long as the officers do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 437 (1991).[4] The Bergers do not dispute they granted the agents permission to enter the home; rather, they argue the agents "coerced the Bergers to submit to these searches" by misleading them into believing the warrant covered the home and by threatening to arrest Mr. Berger. Resp. Br. at 23, 28-29. The Bergers are wrong on both accounts.

[4] The Bergers cite *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the proposition that "consent to enter cannot be voluntary when the request is made by federal law enforcement." Resp. Br. at 29. In support of this reading of *Bivens*, they cite a passage in which the Court distinguished the legal effects of private and police "***demands***" for admission to another's home. 403 U.S. at 394 (emphasis added). The Court's distinction came in the context of rejecting the federal agents' arguments that the remedy for an unconstitutional police entry into the home should be the same as that of a private party, namely, by state trespass or invasion of privacy law. *Id.* Plainly, however, *Bivens* ***does not*** stand for a proposition that law enforcement agents' presence is so inherently coercive that consent may not be recognized.

1. The Agents' Consensual Entry Into the Bergers' Home Was Objectively Reasonable.

The scope of a defendant's consent under the Fourth Amendment is measured by objective reasonableness: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Jimeno*, 500 U.S. at 251. The Ninth Circuit held Berger consented to the agents' initial entry into his home. Pet. App. 6a. This holding amply is supported by uncontested facts. As Berger testified, ***before*** the agents entered his property ***they showed him the search warrant***. J.A. 93 ¶ 4; R. 4, Ex. B at 101:16-17. ***Twice*** the brief text of the warrant's first page plainly stated the home was excluded from the property to be searched. J.A. 17.[5] It was shortly ***after*** seeing the warrant that Berger approved the agents' entry into his home to explain to his wife why they were present on the ranch. R. 8, Ex. 8, tape 7, pages 15-16.

Upon his invitation, two agents entered his home and also explained their need to control any weapons on the ranch to ensure their safety during the search. *Id.* page 9. Berger told them the guns were in the house. *Id.* page 18. They stated their desire to remain with him during the search. *Id.* page 25; R. 7, at 6 ¶ 15. *Cf. Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) ("Establishing a face-to-face confrontation diminishes the possibility, otherwise

---

[5] Considering the warrant's plain exclusion of the home and the agents' explanation that they sought evidence of wildlife poisoning, R. 4, Ex. B at 102:2-6, 24, 103:1-2; R. 8, Ex. 8, tape 7, pages 3-4, the statement that the warrant authorized a search of the "buildings" could not reasonably have been understood or intended to include the house.

substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.").

It was in this context, as the agents searched the open fields, that they returned to the home with Berger several times. Beyond staying by his side to avoid any danger to themselves, they did not search the home for anything, R. 4, Ex. B at 108:11-12, and he did not object to the agents keeping him in sight.

The Bergers assail the initial and subsequent entries of the agents into the Bergers' home that day. However, the reasonableness of such entries thoroughly was justified by Berger's consent and his failure thereafter to object to further entries to his home. *See, e.g., United States v. Stapleton*, 10 F.3d 582 (8th Cir. 1993); *United States v. Mejia*, 953 F.2d 461 (9th Cir. 1991); *United States v. Pena*, 920 F.2d 1509 (10th Cir. 1990); *United States v. Sierra-Hernandez*, 581 F.2d 760 (9th Cir. 1978).

In *Stapleton*, police stopped a car and obtained the driver's consent to search it. The passenger/defendant – later convicted based on a search of his property in the car – remained silent after being told of the intended search and its object. The court held that:

> Given [the passenger/defendant]'s silence in such circumstances, it was objectively reasonable for the patrolmen to conclude either that they had all the consent that was constitutionally required (from [the driver]), or that they had [the passenger/defendant]'s implied consent.

10 F.3d at 584.

In *Mejia*, police officers knocking on defendant's door were greeted by his wife. Upon identifying themselves and that they had come pursuant to a narcotics investigation, the wife let them in. When the officers asked her of her husband's whereabouts she indicated that he was

asleep in the bedroom. The officers followed, without any protest from the wife, as she walked into the bedroom. The court noted that the wife's invitation to enter the home did not subsume permission to enter the bedroom. However,

> once the officers were in the house, [the wife] gave a subsequent implied consent to let them enter the bedroom by not objecting when the officers followed her into the bedroom. Presumably, a reasonable person who objected to the officers' following her would have said so.

953 F.2d at 466. The court noted that even if defendant's wife actually felt uncomfortable objecting to the officers following her into the room (which she never expressed to them), "[t]he overt manifestations of consent existed" and supported the officers' entry into the bedroom. *Id.*

In *Pena*, an officer stopped the defendant on a highway, obtained his consent to search the trunk and look inside his car, and, after searching there, removed a vent with a screwdriver. While the vent was removed, the defendant walked fifteen feet away from the car and ignored the officer. Cocaine was found in the vent. The court affirmed denial of defendant's suppression motion, explaining:

> At no time did he object to or express any concern about the officer's activities. He never attempted to limit or retract his consent. . . . [F]ailure to object to the continuation of the search under these circumstances may be considered an indication that the search was within the scope of the consent.

920 F.2d at 1515 (quotation marks and citation omitted).

In *Sierra-Hernandez*, the court affirmed denial of defendant's suppression motion where he consented to a search inside his truck and did not object or retract or narrow his consent when the officer opened the hood

(where he would find drugs). In an opinion by then-Judge Kennedy, the court held that "[f]ailure to object to the continuation of the search in these circumstances is properly considered as an indication that the search was within the scope of the initial consent." 581 F.2d at 764.

As in *Stapleton*, *Mejia*, *Pena* and *Sierra-Hernandez*, Berger never limited or withdrew his initial consent and the agents behaved objectively reasonably in understanding that they had his consent to keep him within their sights.

2. The Bergers' Consent Was Not the Product of Any Coercive Measures.

The Bergers utterly misrepresent the record to argue their consent was a result of the agents having "threatened Mr. Berger with imprisonment if he did not submit to the federal authorities." Resp. Br. at 29.[6] The so-called "threat" did not come until significantly ***after*** he consented to the agents' entry to his home and ***after*** they entered it. In fact, they were exceedingly unthreatening with the Bergers, R. 8, Ex. 8, tape 7, page 7, and it was only when the search of the outbuildings began and Berger sought to interfere with the seizure of poison that jail was mentioned, and the warning was, at most, a gentle one:

> Joel Scrafford: "Alright, we'll get it, but I want you to stand back out of the way now. I don't want you gettin' upset, you can't breathe."
>
> Paul Berger: "I'm GONNA get upset here goddamn quick!"

---

[6] The Bergers' contention that the agents also "gained entrance to the . . . home . . . by armed force," Resp. Br. at 23, is absurd, and, not surprisingly, supported by no citation to the record.

> Joel Scrafford: "If you get upset, I'm gonna have to take you into Billings, and – and put you in the lockup. And I don't want to do that. . . . "

R. 8, Ex. 8, tape 8, page 3.

Consequently, as a matter of law and fact the Bergers consented to the agents' entry into their home without being subject to any coercion, and the agents' entry, being objectively reasonable under the circumstances, did not violate the Fourth Amendment.

B. The Fourth Amendment Was Not Violated By the Absence in the Warrant of Specific Authorization for CNN to Observe the Agents' Search.

The Bergers contend agents may only take actions specifically approved in a warrant, making unconstitutional for want of authorization the grant of permission to CNN to observe the warrant's execution. However, search warrants "require only three things": issuance by an independent magistrate, probable cause that evidence or the suspect of a crime will be found, and a particular description of the things to be seized and the place to be searched. *Dalia v. United States*, 441 U.S. 238, 255 (1979).

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to [these] three requirements . . . , search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant – subject of course to the general Fourth Amendment protection "against unreasonable searches and seizures."

Id. at 257 (footnote omitted). Thus, for example,

> [n]othing . . . indicates that officers requesting a warrant would be constitutionally required to set forth the anticipated means for execution even in those cases where they know beforehand that unannounced or forced entry likely will be necessary.

Id. n.19.

In arguing that the Fourth Amendment was violated by the warrant's failure to mention CNN, the Bergers rely on a line of cases in which the Court considered the propriety of ***warrantless***[7] police action and cases challenging the ***specificity of the warrant's description of the items to be seized.***[8] However, the Court treats with a

---

[7] *Id.* at 15-16 (citing *Payton v. New York*, 445 U.S. 573 (1980) (warrantless, forceful entry in home to make routine felony arrest); *United States v. United States Dist. Court*, 407 U.S. 297 (1972) (warrantless electronic surveillance); *Wong Sun v. United States*, 371 U.S. 471 (1963) (warrantless arrest in home based on mere suspicion); *Abel v. United States*, 362 U.S. 217 (1960) (warrantless search and seizure of alien suspected of crime while in INS custody but not arrested); *Johnson v. United States*, 333 U.S. 10, 11 (1948) (warrantless arrest and search)). The Bergers cite *Payton* for the proposition that "any governmental intrusion into an individual's home or expectation of privacy must be strictly circumscribed." Resp. Br. at 15-16. However, the language cited is that of the dissent of the New York Court of Appeals, ***not*** the language of this Court. 445 U.S. at 582 n.17. Moreover, unlike the entry into the Bergers' home, the Court emphasized in *Payton* that it was "dealing with entries into homes made without the consent of any occupant." *Id.* at 583. As in *Payton*, the defendant in *Abel* also did not consent to the search. *Abel*, 362 U.S. at 223.

[8] Resp. Br. at 16 (citing *Andresen v. Maryland*, 427 U.S. 463 (1976) (broad descriptive terms in search warrant); *Marron v. United States*, 275 U.S. 192 (1927) (seizure of items not listed in warrant)). It was in the particular context of a search of papers and telephone conversations – in contrast with "executing a

greater measure of deference searches conducted pursuant to precise warrants – as here – than it does warrantless searches or searches conducted pursuant to imprecise warrants.

In *United States v. Ventresca*, examining the sufficiency of the affidavit underlying a warrant, the Court noted: "We begin our analysis of this constitutional rule mindful of the fact that in this case a search was made pursuant to a search warrant." 380 U.S. 102, 105 (1965). The Court emphasized its "strong[ ] support[ ] [for] the preference to be accorded searches under a warrant, [and] indicated that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *Id.* at 106 (citation omitted).[9] Thus, the Court held as to the issue before it that "[a]lthough in a particular case

---

warrant to search for physical objects whose relevance is more easily ascertainable" – that the Court in *Andresen* warned, as cited by the Bergers, that " 'responsible officials, including judicial officials, must take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.' " *Id.* at 16-17 (quoting *Andresen*, 427 U.S. at 482 n.11). The Court explained there that in a search for papers and telephone conversations, there exists a far greater chance that irrelevant, private information will be revealed than in the run-of-the-mill search for physical objects. 427 U.S. at 482 n.11. In contrast, the Bergers do not allege the agents' open fields search or presence in their home revealed irrelevant, private information.

[9] *See also United States v. Leon*, 468 U.S. 897, 913-14 (1984) ("Because a search warrant 'provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a[n] officer' . . . , we have expressed a strong preference for warrants and declared that 'in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail.' ") (citations omitted).

it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 109.

Thus, where, as here, the warrant was issued by an independent magistrate, was supported by probable cause, and particularly detailed the items to be searched for and the places to be searched, it need not recite the means of its execution; rather, the means of executing the warrant are tested under the Fourth Amendment's reasonableness standard. *See, e.g., Richards v. Wisconsin*, 520 U.S. 385 (1997) (despite magistrate's refusal to issue no-knock warrant, no-knock entry pursuant to standard warrant held reasonable where police suspected evidence would be destroyed otherwise); *Horton v. California*, 496 U.S. 128 (1990) (seizure of evidence in plain view that officers hoped and expected to find during search pursuant to warrant for other items is reasonable); *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (detention, search of occupant during warranted search of home reasonable because warrant implicitly carries authority to do so); *Dalia*, 441 U.S. at 258-59 (covert entrance to install surveillance device pursuant to warrant reasonable despite lack of warrant authorization for covert entry); *United States v. Stowe*, 100 F.3d 494 (7th Cir. 1996) (upholding reasonableness of warrant execution where officers videotaped execution without warrant authorization).

CNN's presence as observer did not make unreasonable the agents' otherwise reasonable search. CNN Br. at 20-47.

C. The Bergers' Ignorance of the Fact They Were Being Recorded Is Not Constitutionally Relevant.

The Bergers argue the recording of their conversations with individuals ***they knew to be law enforcement agents executing a warrant***[10] violated the Fourth Amendment because they were not informed the conversations were being recorded. Resp. Br. at 22. The Bergers rely on *Silverman v. United States*, 365 U.S. 505 (1961), *Berger v. New York*, 388 U.S. 41 (1967), and *Alderman v. United States*, 394 U.S. 165 (1969). None of these cases sustains their claim.[11]

In *Silverman*, the Court held only that ***eavesdropping*** accomplished by ***unauthorized*** physical entry on defendants' premises violated the Fourth Amendment. 365 U.S. at 509, 511-12. In *Berger*, the Court struck down a statute permitting "***trespassory*** invasion of the home or office, by general warrant" to ***eavesdrop***. 388 U.S. at 64 (emphasis added). In *Alderman*, the Court affirmed that the Fourth Amendment "affords protection against the

---

[10] The Bergers complain that their "private conversations were monitored and recorded." Resp. Br. at 15. They argue their "conversational privacy" was violated here. *Id.* at 24. However, they neglect to explain that the ***only*** conversations recorded were those in which ***the agents participated***. In other words, the Bergers claim a privacy interest in conversations they knowingly had with individuals they knew to be law enforcement agents, not in regard to conversations they had with one another alone.

[11] *Irvine v. California*, 347 U.S. 128 (1954), upon which the Bergers rely as well, also is of no avail. There the Court held law enforcement agents violated the Fourth Amendment when, without a warrant, they had a key made to the door of defendant's home and on three occasions entered it to install concealed microphones. *Id.* at 131.

uninvited ear" and that "oral statements, if illegally ***overheard***, and their fruits are . . . subject to suppression." 394 U.S. at 171 (emphasis added). Neither *Silverman*, *Berger*, nor *Alderman* involved a government agent as party to the conversations recorded. In marked contrast, the microphone worn by the agent here only recorded conversations in which he was a participant – not an eavesdropper – and which took place on property where he had a right to be by virtue of the warrant or Mr. Berger's consent.

Further, the Bergers argue that "[t]he deceptive means"[12] by which the agents recorded the Bergers' conversations with the agents "underscores" the extent of the Fourth Amendment violation. Resp. Br. at 22. In support they cite *Gouled v. United States*, 255 U.S. 298 (1921), which fails to advance their argument. In *Gouled*, an army officer and business acquaintance of Gouled, at the direction of his army superiors, pretended to make a friendly call upon Gouled, thereby gaining admission to Gouled's office. While in Gouled's office, and unbeknownst to Gouled, the army officer seized and removed several documents later used against Gouled. *Id.* at 304. On these facts, the Court held simply that:

> whether entrance to the home . . . be obtained by [a government agent] by stealth, or through social acquaintance, or in the guise of a business call, . . . any search and seizure subsequently and secretly made in his absence falls within the scope of the prohibition of the 4th Amendment. . . .

Id. at 306.

---

[12] While the Bergers were not informed an agent was wearing a microphone, the record makes evident they knew they were being filmed and were speaking to government agents, and neither CNN nor the agents misrepresented CNN's identity. R. 8, Ex. 8, tape 8, page 13; *id.* tape 21, page 3.

To the contrary, the FWS agents – known by the Bergers to be officers executing a warrant – openly gained access to the Bergers' fields pursuant to a warrant and their home pursuant to Mr. Berger's consent, not by stealth or subterfuge, and, did not search for or seize anything in the house. R. 4, Ex. B at 108:11-12. Consequently, the Bergers' claim that they had a recognizable privacy right in such conversations cannot be accepted.

Moreover, the "uninvited ears" and "uninvited eyes" of CNN, Resp. Br. at 26, do not cure the infirmity of the Bergers' claim.[13] Because they did not have a recognizable privacy interest in conversations with the agents, the recording of those conversations – which the agents constitutionally could have quoted verbatim to anyone – did not violate the Fourth Amendment. *United States v. White*, 401 U.S. 745, 749 (1971) (defendant does not have "a justifiable and constitutionally protected expectation

[13] Despite having sued CNN asserting violation of the Fourth Amendment – and having ***prevailed*** against CNN before the Ninth Circuit on their state action claim – the Bergers charge here that CNN was a "constitutionally uncontrolled actor[ ]." Resp. Br. at 15, 18. They assert that "[t]he scope of the Media's activity could not be controlled. . . . " *Id.* at 34. However, it is manifest that government agents who permit private parties access to private property during a warrant execution – whether in direct aid of the search or, as here, to observe for broader law enforcement purposes – ***always*** remain constitutionally responsible for the private party's actions. *See, e.g., Buonocore v. Harris*, 65 F.3d 347, 359 (4th Cir. 1995) (plaintiff, subject to private search "carried on entirely independently of the official search and in areas not searched by law enforcement officers" and conducted by private party granted access by officers, stated *Bivens* claim against officers); *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (reversing summary judgment for officers where they permitted private party to search for items not mentioned in warrant after officers had seized the one item listed in warrant).

that [the] person with whom he is conversing will not then or later reveal the conversation");[14] *Hoffa v. United States*, 385 U.S. 293, 302 (1966) ("[I]t is evident that no interest legitimately protected by the Fourth Amendment is involved" where law enforcement informant "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence.");[15] *Lopez v. United States*, 373 U.S. 427, 438 (1963) (Where officer wore hidden microphone and was present at the invitation of the defendant, there would be no suppression of "statements made by [the defendant] to [the officer], statements which [the defendant] knew full well could be used against him by [the officer] if he wished."); *United States v. Rubio*, 727 F.2d

[14] The Bergers contend *White* "does not address the question presented" because the Court there merely reversed the Court of Appeals' decision which had been based on *Katz v. United States*, 389 U.S. 347 (1967), a case decided after the underlying events in *White*. Resp. Br. at 26 n.34. They neglect to mention that the *White* decision was based on two grounds: "In our view, ***the Court of Appeals misinterpreted both the Katz case and the Fourth Amendment*** and in any event erred in applying the Katz case to events that occurred before that decision was rendered by this Court." 401 U.S. at 747 (emphasis added). The Court, in the plurality decision announcing its judgment, then devoted all but the final paragraph of its opinion to analyzing the effect of *Katz* on the viability of the Court's earlier decisions concerning warrantless eavesdropping. It is upon this lengthy discussion that CNN relies and which today governs application of the invited informer doctrine.

[15] As here, the Court in *Hoffa* explained that the informant "did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. [The informant] was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence." 385 U.S. at 302.

786, 797 (9th Cir. 1983) (once consent is obtained from one with authority to give it, "any expectation of privacy has been lost.").

As the Court explained in *White*, the issue is not whether the person searched has a subjective expectation of privacy, but whether an expectation of privacy is "constitutionally 'justifiable.' " 401 U.S. at 752.

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

Id. at 751. Thus, the precise issue raised by the recording of the Bergers' conversations with the agents is whether the Bergers had a constitutionally justifiable expectation of privacy in such conversations.[16] Because the answer is

---

[16] The Bergers urge the Court to reject the invited informer doctrine of *White*, *Hoffa*, and *Lopez* because they contend that in those cases "the government agent or third party informer did not violate the Fourth Amendment because they were all engaged in a legitimate law enforcement purpose," where as here the agents' purpose was "to assist commercial television." Resp. Br. at 26, 22. However, in none of these cases did the Court consider, let alone discuss, "law enforcement purposes." Rather, the inquiry of the invited informer doctrine is whether the privacy expectation asserted is reasonable. In any event, it is beyond dispute that the primary law enforcement purpose that brought the agents to the ranch was to search for evidence of wildlife crimes which they suspected – and had suspected since before CNN's interest in the subject, J.A. 52 ¶ 34 – Mr. Berger had committed. (The evidence seized would in fact lead to his conviction. J.A. 63 ¶ 83.) Moreover, additional law enforcement

no – being exclusively conversations the Bergers knowingly had with agents executing a warrant or whom they invited into their home – the fact the conversations were recorded has no bearing on the constitutional calculus.

> It is . . . untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder of transmitter as conducting an "unreasonable" and unconstitutional search and seizure.

Id. at 753.

D. CNN's Presence Did Not Convert the Search Into a Prohibited General Warrant or Writ of Assistance.

What is clear from the cases the Bergers and their amici cite in recounting the history of the Fourth Amendment, is that the Amendment was meant to protect against indiscriminate searches and seizures without the support of a precise and specific warrant or on behalf of the claims of a private individual.[17] In this regard, the

---

purposes served by permitting CNN to observe the warrant's execution, CNN Br. at 21-34, certainly were not "illegitimate." Once an invasion of the Bergers' privacy was warranted to search for evidence of crime, it was not unreasonable for other, broader law enforcement aims to be served simultaneously through public exposure.

[17] *See, e.g., Andresen v. Maryland*, 427 U.S. 463, 480 (1976) ("The problem posed by the general warrant is not that of intrusion per se, but of a general exploratory rummaging in a person's belongings. The Fourth Amendment addresses the problem by requiring a 'particular description' of the things to be seized. This requirement makes general searches impossible

Bergers argue that through CNN's mere presence as a witness to the agents' execution of the warrant, "[t]he warrant was used to authorize a Media search of the ranch and all of its structures" and, thereby, was "converted . . . into both a general warrant and a writ of assistance for the Media." Resp. Br. at 34. This contention is not supported by the case law cited or the unambiguous record below.

While "this Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity," *Tennessee v. Garner*, 471 U.S. 1, 13 (1985), the common law cited by the Bergers and their amici does not provide pertinent guidance here.[18] None of the cases supports, let alone affirmatively addresses, the contention that a search conducted ***pursuant to a particularized warrant*** and ***for law enforcement purposes*** – namely, the search for evidence of a crime – is made untoward by the presence of a third party ***observer***. Moreover, the Bergers' historical accounting does not support the notion that the primary law enforcement purpose of searching for evidence of crime somehow is eradicated by the concurrent advancement of

---

and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.") (citations, quotation marks, and brackets omitted); *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603) (unlawful for sheriff to enter defendant's house against his will to execute warrant in support of a private party's claim against the defendant).

[18] Reference to the common law, however, has not led this Court to "simply fr[eeze] into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage." *Payton v. New York*, 445 U.S. 573, 591 n.33 (1980); *accord Tennessee*, 471 U.S. at 13.

other law enforcement interests[19] ***and*** CNN's purpose of informing the public.

The record also cannot support the Bergers' charge that they were victims of a general warrant or writ of assistance. It is undisputed that the FWS suspected Berger was illegally killing protected wildlife ***before*** CNN expressed an interest in the subject, R. 3 at 2 ¶¶ 3-4; J.A. 21-25, 32-34, 40-42, and that the agents' reason for procuring and executing the search warrant was to locate evidence of such crimes. J.A. 21-25, 32-34, 40-42. Furthermore, nothing in the record supports an assertion that the agents searched for any items besides those particularly identified in the warrant, or searched for anything at all upon their consensual entry inside the Bergers' home.

In sum, it is not pre-colonial common law but the deep body of this Court's case law interpreting and applying the Fourth Amendment reasonableness standard which guides in determining, in light of "all the circumstances," *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997), the issue posed here. Given public interests of great import to a democratic society,[20] an asserted privacy interest not of constitutional magnitude, and the

---

[19] The grant of access to CNN furthered the law enforcement interests of enabling public oversight of coercive government activity, deterring crime, and curbing potential police misconduct and danger to police. CNN Br. 21-34.

[20] As the Bergers readily acknowledge, "police agencies are subject to public, political control and, if appropriate, condemnation. Presumably their officials, and the governments they are part of, are subject to political repudiation or, at least, exposure for abuses." Resp. Br. at 19. The grant of access to CNN here played an important role in assuring the effectiveness of this check.

incremental impact of the challenged conduct on the privacy interest asserted, the Fourth Amendment reasonableness balance soundly favors the grant of access to CNN here as surrogate for the public.

CONCLUSION

CNN respectfully requests that the Court reverse the Ninth Circuit's holding that the Fourth Amendment was violated by the grant of access to CNN.

Respectfully submitted,

DAVID C. KOHLER
JENNIFER FALK WEISS
CABLE NEWS NETWORK LP, LLLP
One CNN Center
P.O. Box 105366
Atlanta, Georgia 30348

P. CAMERON DEVORE*
JESSICA L. GOLDMAN
MICHELE EARL-HUBBARD
ERIC STAHL
DAVID BOWMAN
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150
Counsel for Cable News Network LP, LLLP, Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann

Counsel of Record

(12)

Supreme Court, U.S.
FILED
MAR 1 1999
OFFICE OF THE CLERK

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF FOR PETITIONERS

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Counsel for Petitioners

24pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING NEWS MEDIA TO ACCOMPANY THEM AS THEY EXECUTED THE WARRANT 1

A. Officers Are Responsible for Third Parties Who Accompany Them, Whose Conduct Is Subject to the Same Constitutional Limits 2

B. The Fourth Amendment Permits Officers to Be Accompanied by Third Parties to Aid in Discharging the Law Enforcement Mission 5

C. Petitioners Acted Reasonably by Allowing News Media to Observe and Record Them Executing the Search Warrant in This Case 11

II. THE FOURTH AMENDMENT'S HISTORY DOES NOT SUPPORT RESPONDENTS 12

III. THE DEFENSE OF QUALIFIED IMMUNITY IS PROPER IN THIS CASE 16

A. Qualified Immunity Is Proper Under *Mitchell v. Forsyth* Because the Law Was Not Clearly Established at the Time Petitioners Acted 16

B. Qualified Immunity Is Proper Under *Anderson v. Creighton* Because It Was Not Apparent that Petitioners Violated the Fourth Amendment 18

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 18, 19, 20
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) 8, 17
Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992) 2
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 20
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 2, 17
Byars v. United States, 273 U.S. 28 (1927) 2
Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) 19
Chimel v. California, 395 U.S. 752 (1969) 9
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 10
Commonwealth v. Farrar, 413 A.2d 1094 (Pa. Super. 1979) 6
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 9
Dalia v. United States, 441 U.S. 238 (1979) 5, 8, 14
Elkins v. United States, 364 U.S. 206 (1960) 3
Entick v. Carrington, 19 How. St. Tr. 1029 (K.B. 1765) . 13
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16, 20
Higbee v. Times-Advocate, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) 17
Horton v. California, 496 U.S. 128 (1990) 9
Kelley v. State, 315 S.E.2d 916 (Ga. App. 1984) 5
Lopez v. United States, 373 U.S. 427 (1963) 4
Marcus v. Search Warrant, 367 U.S. 717 (1961) 14
Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 14
Maryland v. Buie, 494 U.S. 325 (1990) 9
Michigan v. Summers, 452 U.S. 692 (1981) 11
Mitchell v. Forsyth, 472 U.S. 511 (1985) 16, 17, 18
Moncrief v. Hanton, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) 17
People v. Superior Ct., 598 P.2d 877 (Cal. 1979) 6

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

People v. Turner, 57 Cal. Rptr. 854 (Ct. App. 1967) 6
Prahl v. Brosamle, 295 N.W.2d 768 (Wis. App. 1980) 17
Procunier v. Navarette, 434 U.S. 555 (1978) 18
Scott v. State, 559 So. 2d 269 (Fla. App. 1990) 17
Scott v. United States, 436 U.S. 128 (1978) 10
Semayne v. Gresham, 77 Eng. Rep. 194 (K.B. 1604) 12
Stanford v. Texas, 379 U.S. 476 (1965) 14
State v. Klosterman, 317 N.W.2d 796 (N.D. 1982) 6
State v. Wade, 544 So. 2d 1028 (Fla. App. 1989) 6
Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) ... 19
United States v. Caceres, 440 U.S. 741 (1979) 4
United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) (per curiam) 6, 7
United States v. Lanier, 117 S. Ct. 1219 (1997) 17
United States v. Martin, 600 F.2d 1175 (5th Cir. 1979) ... 7
United States v. McKeever, 906 F.2d 129 (5th Cir. 1990) 6
United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988) .. 2
United States v. Ramirez, 118 S. Ct. 992 (1998) 5, 8
United States v. Robertson, 21 F.3d 1030 (10th Cir. 1994) 7
United States v. Sigal, 341 F.2d 837 (3d Cir.), *cert. denied*, 382 U.S. 811 (1965) 7
United States v. White, 401 U.S. 745 (1971) 4, 9
Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) ... 13
Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981) 20
Walter v. United States, 447 U.S. 649 (1980) 13
Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. 1763) 13
Wilson v. Layne, 141 F.3d 111 (1998) (en banc), *cert. granted*, No. 98-83 ..... 10, 17, 18

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, Rules, Policies

U.S. CONST. amend. IV ..... *passim*
18 U.S.C. § 3105 ..... 6, 7, 8
U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII (Assisting the News Media) (as amended Jan.14, 1993) 19

Other Authorities

4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769) 12
2 WAYNE R. LAFAVE, SEARCH AND SEIZURE (1996) 2
NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937) 15
Julius J. Marke, *The Writs of Assistance Case and the Fourth Amendment*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 351 (ed. Morris D. Forkosch 1966) 15

REPLY BRIEF FOR PETITIONERS

The Court's ruling in this case is one of first impression. The Court has never before articulated any constitutional limits upon officers deciding when third parties may accompany them as they execute a warrant or perform other law enforcement functions. Instead, these kinds of determinations have generally been left to the officers' reasonable discretion about how best to further their law enforcement mission, within all of the familiar constraints otherwise imposed by the Fourth Amendment. Petitioners contend that the pragmatic "reasonableness" test is the proper approach to this issue, and that their conduct was reasonable in this case. Petitioners strongly disagree with the rigid, *per se* rule offered by respondents, which would flatly prohibit officers from being accompanied by prosecutors, news media, civilian employees, or other third parties who are not actively involved in executing a warrant, even when the officers may reasonably judge that the presence of such individuals would assist them or aid their law enforcement mission.

Even if the Court were to disagree with petitioners on the threshold constitutional issue, their defense of qualified immunity should be upheld here. At the time petitioners acted, the law was not clearly established, and it was not apparent, that their conduct violated the Fourth Amendment.

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING NEWS MEDIA TO ACCOMPANY THEM AS THEY EXECUTED THE WARRANT.

Petitioners' own actions in obtaining and executing the search warrant in this case were proper and did not violate the Fourth Amendment. *See* Pet. Br. 11-14. Respondents' further claim that the officers' decision to allow members of the news media (or any third parties, such as petitioner McLean, the assistant prosecutor) to accompany them merely to observe and record their execution of a warrant *ipso facto* violates the

Fourth Amendment is not well taken. In the absence of any close precedent to guide the Court's inquiry in this regard, petitioners respectfully suggest that such claims should be judged by a two-part test: (1) did the actions of the third parties themselves comply with the restrictions imposed by the Fourth Amendment; and (2) could the presence of the third parties reasonably be judged to assist the officers or to further their law enforcement mission. If the answer to both questions is in the affirmative, as in this case, then the Fourth Amendment is not violated.

A. Officers Are Responsible for Third Parties Who Accompany Them, Whose Conduct Is Subject to the Same Constitutional Limits.

Professor LaFave, widely recognized as an authority on the Fourth Amendment, concludes that when law enforcement officers execute a warrant, they may be accompanied by third parties, but "the non-law enforcement personnel must, in effect, be governed by the same rules as law enforcement personnel in considering their conduct during the search." 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.10(d) (1996) (quotation omitted). These sensible constraints would appear to flow from standard principles of agency law. *See, e.g., Byars v. United States*, 273 U.S. 28, 33 (1927) (in any such joint endeavor, "the effect is the same as though [the officer] had engaged in the undertaking as one exclusively his own"). Thus it seems clear that if officers — either wittingly or unwittingly — facilitate a search or seizure by a third party that would violate the Fourth Amendment if the officers had undertaken it themselves, then the officers may properly be charged with the resulting constitutional violation. Many decisions are to this effect, *see, e.g., Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995); *Bills v. Aseltine*, 958 F.2d 697, 705 (6th Cir. 1992); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988), and this conclusion seems to accord with the Court's rejection of the

"silver platter" doctrine, *see Elkins v. United States*, 364 U.S. 206 (1960).

In this case, the federal officers were acting pursuant to a valid search warrant. Pet. App. 30a. Their own actions in executing the warrant were proper, as the courts held both in this case, *see* Pet. App. 6a; *id.* at 34a ("otherwise valid search"), and in the related criminal proceedings where Mr. Berger's motion to suppress evidence was denied, *see* E.R. Tab 5, Exh. G, at 4-5. Although respondents occasionally take issue with these conclusions, particularly concerning whether the officers entered the Bergers' residence without consent, *see* Resp. Br. 5-7, 28-30, they fail to note that no search occurred there and that even the court below expressly held that the issue of consent was readily resolved in favor of the officers by reference to the audio recorded at the site, which definitely indicated that consent was given, *see* Pet. App. 6a.

Respondents also assert, however, that the news media themselves engaged in a search and seizure in this case, which was unauthorized by the warrant and hence violated the Fourth Amendment. Resp. Br. 21-23. Under the approach set forth above, the soundness of this assertion is critical to the constitutional inquiry. Yet respondents offer virtually no legal analysis to support this assertion. Their sole rationale for the claim that the media engaged in an actual search or seizure is that eavesdropping on private conversations, and the capturing of oral statements made in those conversations, implicate the Fourth Amendment. *Id.* at 21-22.

These statements are correct as far as they go, but they have little bearing on the facts of this case. The Court's rulings that have protected the sanctity of conversations which occur solely among private individuals do not control statements made to federal law enforcement officers who are known to be such, who announced their authority upon their arrival, and indeed who bore the name "FEDERAL AGENT" emblazoned on their

clothing. The central question here is whether respondents had a "reasonable expectation of privacy" in those conversations, and it is clear that they did not.

Indeed, the Court has consistently held that there is no reasonable expectation of privacy even in private conversations, where one party turns out to be a government agent, even if the complaining party was unaware of this fact. *See, e.g., United States v. White*, 401 U.S. 745, 753 (1971) (no search because no invasion of any reasonable expectation of privacy, as "we are not prepared to hold that a defendant who has no constitutional right to exclude the [officer's] unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question"); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same result with respect to "conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose"); *see also United States v. Caceres*, 440 U.S. 741, 750-52 (1979) (rejecting individual's claim to privacy in this situation, which "does not raise any constitutional questions").[1]

Moreover, the officers and the media did not engage in a search or seizure or otherwise violate the Fourth Amendment by videotaping or audiotaping the events. These matters were fully canvassed in petitioners' opening brief, *see* Pet. Br. 14-17, and need not be rehashed here. The District Court was thus correct in stating that this case does not involve a situation in which the media actively participated in searching for or seizing evidence; rather, the media defendants were "simply observing the agents who were serving the warrant." Pet. App. 36a.

[1] The Court should reject respondents' apparent invitation to overrule these decisions. Resp. Br. 26-27 & nn.34-35.

B. The Fourth Amendment Permits Officers to Be Accompanied by Third Parties to Aid in Discharging the Law Enforcement Mission.

Respondents also contend that the Fourth Amendment is violated by the mere presence of third parties, such as members of the news media, when officers are executing a warrant. Their discussion hovers around two different justifications for this contention. The stronger claim is that the Fourth Amendment is violated whenever any third party accompanies officers who make an entry onto private property without consent in order to execute a warrant. The milder version is that the Fourth Amendment is violated when officers execute a warrant and are accompanied by third parties who are not actively assisting by joining in the execution of the warrant, regardless of whether their presence could reasonably be judged to aid the officers or to serve other legitimate law enforcement purposes. *See* Resp. Br. 12-34. Neither approach is supported by the Court's prior decisions.

As petitioners have stated, the proper legal framework for deciding this issue is the "general touchstone of reasonableness which governs Fourth Amendment analysis," including "the manner of executing a search warrant." *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998). Indeed, this is the *only* language from the constitutional text that applies here, since "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia v. United States*, 441 U.S. 238, 257 (1979).

The extreme nature of respondents' position is shown by the fact that under either approach the mere presence at the search of petitioner McLean, the assistant prosecutor, would have been unlawful. Yet such occurrences are commonplace around the country, and they have never been held to violate the Constitution. *See, e.g., Kelley v. State*, 315 S.E.2d 916, 919 (Ga. App. 1984) (no Fourth Amendment violation where

"Assistant United States Attorney was a mere observer of the search and did not participate in it"); *United States v. McKeever*, 906 F.2d 129, 131-32 (5th Cir. 1990) (no Fourth Amendment violation where magistrate judge who issued search warrant attended and observed but "did not in any way assist with the search").

Respondents' stronger claim is refuted by a broad array of cases in which officers have invited along third parties as they execute a search warrant to help them determine what evidence should be identified and seized. The courts routinely uphold this practice as consistent with the Fourth Amendment, even though the presence of such individuals is typically not authorized by the warrant. *See, e.g., State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (victims of theft accompanied officers in search of defendant's home for stolen property); *People v. Superior Ct.*, 598 P.2d 877, 881 (Cal. 1979) (same); *Commonwealth v. Farrar*, 413 A.2d 1094, 1096-99 (Pa. Super. 1979) (private citizens accompanied officers executing search warrant in defendant's home for stolen property). The courts have approved this practice even when the third parties had no personal knowledge of the crime being investigated. *State v. Wade*, 544 So. 2d 1028, 1030-31 (Fla. App. 1989) (police allowed computer company employees to accompany them in executing search warrant inside a home to identify stolen computer equipment); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam) (police allowed telephone company employees to accompany them in executing search warrant inside a home and to identify telephone company property not listed in the warrant); *People v. Turner*, 57 Cal. Rptr. 854, 865 (Ct. App. 1967) (police allowed employer's fraud investigators to accompany them into employee's home to execute search warrant).

The federal statute which governs the service of search warrants, 18 U.S.C. § 3105, also refutes respondents' stronger claim. It states that a search warrant "may in all cases be served

by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, *except in aid of the officer on his requiring it*, he being present and acting in its execution." *Id.* (emphasis added). The plain language of this statute clearly contemplates that third parties are permitted to accompany officers who are executing a warrant, and to assist them, where the officers have authorized them to do so. Although this Court has never had occasion to construe the terms of this statute, the lower courts have so applied it. *See, e.g., United States v. Robertson*, 21 F.3d 1030, 1034 (10th Cir. 1994); *Clouston*, 623 F.2d at 486-87.[2]

Respondents' milder claim is also inconsistent with law and precedent. In essence, respondents argue that when officers enter private property to execute a warrant, they are permitted to do only what the terms of the warrant specifically authorize them to do, and to receive assistance only for that purpose. Any other actions or assistance that might reasonably be judged to further their law enforcement mission — even actions that do not constitute an independent search or seizure under the Fourth Amendment — are alleged to be prohibited. This approach is not reasonable, and it does not square with existing law.

As an initial matter, respondents' approach again is inconsistent with the federal statute, which explicitly permits officers who are executing a search warrant to require aid from

---

[2] The statute itself deals only with who may serve and execute a search warrant, not with the question of what restrictions, if any, may be placed on the invitation of observers. Moreover, the statute was not intended to be restrictive in operation, but was intended to expand upon prior practice by allowing officers other than those who may be expressly named on the face of the warrant to serve and execute it; as one court has summarized its purpose, the statute "confers no substantive authority to execute a warrant, but was intended to enlarge the common law rule that a search warrant must be directed to a particular person and executed by that person." *United States v. Sigal*, 341 F.2d 837, 843 (3d Cir.), *cert. denied*, 382 U.S. 811 (1965); *United States v. Martin*, 600 F.2d 1175, 1181-82 (5th Cir. 1979) (same).

third parties, whether or not the warrant authorizes their help. *See* 18 U.S.C. § 3105. Indeed, the statute does not impose any express limits on the *kind* of aid that the officers may receive, and thus contemplates not only active assistance in executing the warrant, but also other kinds of aid that may be needed or might reasonably be judged to further their law enforcement mission. Examples of such legitimate aid might include clerical help, medical services, or (in instances where the search is prolonged, as in this case) general administrative or logistical support.[3]

Even more to the point, the Court has never taken such a narrow view of officers' authority to execute a valid warrant. Under the Fourth Amendment, the purpose of a warrant is to confer specific authority either to *search* a particular place for particular persons or things or to *seize* particular persons or things, and to permit an impartial magistrate to engage in independent review of submissions made by oath or affirmation before such authority is conferred. *See Dalia*, 441 U.S. at 255-57. All other aspects of executing a warrant are governed by the pragmatic standard of "reasonableness," which does not prohibit officers from undertaking further actions that are limited in scope and reasonably intended to promote the legitimate objective of effective law enforcement. *See, e.g., id.*; *Ramirez*, 118 S. Ct. at 996.

Thus, for example, when officers execute an arrest warrant by making the arrest, the Court has held that they may proceed to perform a limited search incident to arrest, even though no

---

[3] In any event, respondents' claim that 18 U.S.C. § 3105 is violated by the mere presence of the news media, *see* Resp. Br. 46-47, even where the media personnel were not themselves involved in either serving or executing the search warrant, is not supported by the language of the statute, which speaks only to those actions. *See supra* note 2; *cf. Ayeni v. Mottola*, 35 F.3d 680, 687 (2d Cir. 1994) (statute "identifies those who may 'serve' a search warrant . . . but it has been construed to determine those who may 'execute' a warrant"), *cert. denied*, 514 U.S. 1062 (1995).

such search is expressly authorized by the warrant. *See, e.g., Chimel v. California*, 395 U.S. 752 (1969) (permitting search of person and immediate vicinity); *Maryland v. Buie*, 494 U.S. 325 (1990) (permitting protective sweep of residence). The rationale for the search is that it reasonably furthers important objectives of effective law enforcement by protecting the officers' safety and preventing the concealment or destruction of evidence. *Chimel*, 395 U.S. at 763. In a different vein, the "plain view" doctrine allows officers who are executing a search warrant to seize evidence that was not identified in the warrant if they inadvertently come across it in the course of the authorized search. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion); *Horton v. California*, 496 U.S. 128 (1990). The express rationale for this doctrine is that the "minor peril to Fourth Amendment protections" is outweighed by "a major gain in effective law enforcement." *Coolidge*, 403 U.S. at 467. Respondents' rigid approach to the execution of warrants does not accord with the reasoning of these decisions, which go even further by sanctioning additional unwarranted *searches* and *seizures* as compatible with the "reasonableness" standard embodied in the Fourth Amendment.

As petitioners have noted, there are good reasons why officers may want to have certain third parties accompany them as they execute a warrant. *See* Pet. Br. 19-26. Many of those reasons can reasonably be judged to further the objective of effective law enforcement, even though the third parties do not actively assist the officers by joining in the search for evidence. As long as the actions taken by such third parties are themselves subject to all the familiar constraints of the Fourth Amendment, the officers act reasonably by securing their assistance.

In addition, in many instances it would be reasonable for officers to judge that having certain persons present may directly aid them in executing a warrant. Especially where the third parties can provide a "more accurate version of the events in question," *White*, 401 U.S. at 753, either as witnesses or by

recording the events, or where their presence may help protect the safety of the officers, *see Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998) (en banc), *cert. granted* No. 98-83, it would be reasonable for the officers to believe that this assistance is material in helping them execute the warrant on the spot.

Respondents make much of the fact that the media have their own purposes for wanting to obtain footage of the events, and suggest that these motivations are relevant in determining whether the resulting search is unreasonable and unlawful. *See* Resp. Br. 21-22, 26-28. This suggestion is in error, however, for the proper inquiry under the Fourth Amendment is limited to evaluating the objective reasonableness of the officers' conduct. Neither their own subjective motivations, *see Scott v. United States*, 436 U.S. 128, 137 (1978), nor the intentions of others are relevant to this inquiry. Were the law otherwise, then the undeniable fact that many informants are motivated by personal animus, or hope for a lighter sentence, could undermine the legality of many established law enforcement practices. Thus the mere fact that the press and the media are typically engaged in a profitmaking venture, which may lead them to seek out information that will be most appealing in capturing the public's interest, has never been thought to denigrate the importance of allowing the press and public to have at least limited access to important government functions. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 420-21 (1993).[4]

---

[4] Respondents also ask, in a series of rhetorical questions, what standards will operate to control "these media actors claimed to be granted access to private property by the Fourth Amendment?" Resp. Br. 19. To begin with, no claim has been made that the Fourth Amendment — or any other constitutional provision — grants any such access, but simply that it does not prohibit officers from making reasonable determinations about when they may be accompanied by third parties as they execute a warrant or engage in other law enforcement functions. In any event, however, the answer to all of these questions is the common law, as described more fully in petitioners' opening brief. *See* Pet. Br. 29-32 (discussing tort claims of trespass and invasion of privacy).

C. Petitioners Acted Reasonably by Allowing News Media to Observe and Record Them Executing the Search Warrant in This Case.

Analyzing the reasonableness of petitioners' conduct in this case requires evaluating both "the character of the official intrusion and its justification." *Michigan v. Summers*, 452 U.S. 692, 701 (1981); *see* Pet. Br. 26-29.

The additional infringement on respondents' privacy from having three media personnel accompany about twenty officers who were already executing a valid search warrant at the ranch was negligible. The media were not permitted to engage in any independent search or seizure of evidence, but merely observed and recorded what the officers themselves saw and heard. The search was limited to open spaces and outbuildings located on the ranch; it did not involve any physical intrusion upon respondents' persons or examination of their personal papers or effects. Moreover, the alleged crimes which gave rise to the search were matters of valid public interest that did not appear to involve any intensely private matters or intimate personal details.

The most obvious justifications for the officers to allow the media to accompany them have been discussed at length in petitioners' opening brief. Petitioners could reasonably judge that the media's involvement would further their law enforcement mission by facilitating accurate reporting of their activities, which would tend to enhance public confidence and improve public oversight; by publicizing their efforts to fight crime, which would help to deter crime; and by ensuring a more accurate record of events, which would help in resolving legal issues that could arise later in ensuing criminal and civil proceedings. *See* Pet. Br. 22-29. Similar reasoning was thought to justify the presence of petitioner McLean at the ranch, which would appear to be unexceptionable under the Fourth Amendment, but which would be illegal under the categorical

approach proposed by respondents. The notion that officers' conduct in executing a warrant should thus be walled off from any first-hand public scrutiny is unreasonable, and would disserve the fundamental constitutional aim of protecting individual liberties against government abuses.

II. THE FOURTH AMENDMENT'S HISTORY DOES NOT SUPPORT RESPONDENTS.

Respondents and their *amici* frequently raise the unpleasant specter of general warrants and writs of assistance in order to suggest that the common practice of media ride-alongs is proscribed by the traditions of the common law. *See, e.g.*, Resp. Br. 33-34. Nothing in the historical record, however, justifies this flawed analogy. Indeed, none of the cited cases or materials suggests that the Fourth Amendment was intended to prohibit officers from making reasonable judgments about when third parties could accompany them to assist in executing warrants and to help them perform their law enforcement functions.

Semayne v. Gresham, 77 Eng. Rep. 194 (K.B. 1604), stands for the proposition that a sheriff could not forcibly enter a house merely to serve civil process. The court was concerned that if such conduct were permitted, then "on any feigned suit, the house of any man at any time might be broke." *Id.* at 198. Yet the court recognized that this situation was distinct from the service of criminal process or a warrant on behalf of the Crown, which confers proper authority upon the officers to serve and execute it even in a home. *Id.* at 195. Blackstone recognized and approved the same distinction, observing that because one's house is regarded as his castle, "no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private." 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *223 (1769).

Respondents' *amici* draw from *Semayne* that it would be improper for an officer to enter a home or to obtain and execute

a warrant solely to serve the personal interests of a private party, rather than to further the government's purposes. *See* NASCAT Br. 15-16, 26; PLF Br. 13. That may well be so, but it has nothing to do with *this* case, in which petitioners properly obtained a valid warrant to search for evidence of crime, which led ultimately to the trial and conviction of Mr. Berger on a federal misdemeanor charge. And, as already discussed, the fact that third parties may have other motives that spur their own participation in law enforcement activities has no bearing on the objective reasonableness of the officers' conduct under the Fourth Amendment. *See supra* page 10.

The classic English cases that preceded the adoption of the Fourth Amendment are also irrelevant here. Respondents and their *amici* cite *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), in a mistaken attempt to conflate the evils of a general warrant with the very different situation confronted in this case. *See* Resp. Br. 12; NASCAT Br. 22-23. Those evils, however, were twofold, and they were directly eradicated by the specific language of the Fourth Amendment. *First*, the requirement of individualized suspicion underlying most general warrants had been "subjective and largely unenforceable," but this problem was cured by making that requirement "meaningful and enforceable" by requiring independent judicial review of submissions made on oath or affirmation and "raising the required level of individualized suspicion to objective probable cause." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-70 (1995) (O'Connor, J., dissenting). *Second*, the power conferred by a general warrant was "unbridled" and open-ended, typically avoiding any identification of the places or persons to be searched and the persons or things to be seized, thus allowing officers "to launch forth upon unconfined searches and indiscriminate seizures," a problem that was solved by including the particularity requirement in the Fourth Amendment. *Walter v. United States*, 447 U.S. 649, 653 (1980) (quotation omitted).

Neither problem is presented when media accompany officers who are executing a warrant. The warrant cannot be obtained unless the constitutional standard of probable cause is shown, as judged by a neutral and detached magistrate. And the warrant must be particular, either as to the places or persons to be searched or as to the persons or things to be seized. These are the explicit requirements of the Fourth Amendment, *see Dalia*, 441 U.S. at 257, and they were met in this case. The mere presence of third parties, such as the media personnel here, who themselves are not permitted to exceed the constraints imposed by the Fourth Amendment, does not threaten to foster either of the principal evils that flowed from general warrants, which have long been repudiated in Anglo-American law.

As for the writs of assistance, which "met such vigorous opposition in the American Colonies prior to the Revolution," the problems there were quite similar to the general warrants, though even broader in scope. *Marcus v. Search Warrant*, 367 U.S. 717, 729 n.22 (1961). These writs "empowered the executing officer to seize any illegally imported goods or merchandise. Moreover, in addition to authorizing search without limit of place, they had no fixed duration." *Id.* When James Otis inveighed against "the hated writs of assistance," he was objecting to the fact that they "had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws," *Stanford v. Texas*, 379 U.S. 476, 481 (1965), and thus "granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), a power that once granted would remain operative throughout the reign of the current monarch. As one account describes the writ of assistance:

> The writ was particularly vicious in that it was so general and arbitrary. No special writ of search, issued on sworn testimony that the smuggled goods were concealed in a definite place, was needed. The writ

> was not returnable to the court after execution but rather continued indefinitely in effect until the demise of the reigning monarch and for six months thereafter as a license to search and seize uncustomed goods anywhere. The official in possession of the writ therefore had absolute and unlimited discretion in its execution.

Julius J. Marke, *The Writs of Assistance Case and the Fourth Amendment*, in ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER 351, 356 (ed. Morris D. Forkosch 1966).

To suggest that the facts of this case, and the conduct of these officers, bears any remote relationship to the wholesale ransacking of private possessions that flowed from the colonial writs of assistance is to engage in reasoning by epithet. The true evil of the writs of assistance was that they allowed untrammeled exploratory searches of persons, houses, papers, and effects by empowering officers and their agents "to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye." NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 54 (1937). Indeed, in a telling passage from Lasson's classic study of the historical origins of the Fourth Amendment, he takes pains to point out that though the writs of assistance "received their name from the fact that they commanded all officers and subjects of the Crown to assist in their execution," this "*was not the objectionable feature*," and that "the assistance of bystanders may now also be asked in the execution of search warrants." *Id.* at 53-54 (emphasis added).

The historical record thus provides no support for respondents' claim that the origins of the Fourth Amendment demonstrate that it is impermissible for officers executing a warrant to allow third parties to accompany them when they reasonably judge that it would assist them or further their law

enforcement mission to do so. It follows that the historical record provides no "clearly established" law for purposes of the Court's inquiry into the qualified immunity issue either.

III. THE DEFENSE OF QUALIFIED IMMUNITY IS PROPER IN THIS CASE.

It bears emphasis again that the Court has never addressed any of the broader questions raised in this case about when officers may be accompanied or assisted by third parties as they execute a warrant. As a result, the law was not clearly established, and it would not have been apparent to a reasonable officer at the time, that the mere presence of news media to observe and record the execution of the warrant was unlawful. These conclusions are particularly apt where the historical background reflects no clear consensus that such conduct is out of bounds, and indeed seemed to permit and sanction it by recognizing that it reflected customs and practices of long standing. The Court should thus uphold petitioners' defense of qualified immunity.

A. Qualified Immunity Is Proper Under *Mitchell v. Forsyth* Because the Law Was Not Clearly Established at the Time Petitioners Acted.

Qualified immunity is proper unless the officials' conduct violates constitutional rights that were "clearly established" at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985).

Mitchell is directly controlling here. There, as here, the plaintiff alleged a violation of the Fourth Amendment. There, as here, the only decisions that had addressed the constitutional issue at the time were opinions by lower courts that had upheld the legality of such conduct, which had been generally permitted for at least a quarter-century. There, as here, the first decisions to disapprove such conduct postdated the events in question,

which eventually led the Supreme Court itself to intervene in order to issue a definitive decision on the constitutional issue. *See* 472 U.S. at 532-36. In view of those circumstances, the Court held that defendants were entitled to qualified immunity because the law had not been "clearly established" at the time, and any "hindsight-based reasoning on immunity issues" would be improper. *Id.* at 535.

The same conclusion is dictated in this case. Several decisions at the time had rejected claims that such conduct violated federal constitutional rights, and no decision had accepted such a claim. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980); *Scott v. State*, 559 So. 2d 269, 272 (Fla. App. 1990). Other courts had recognized that media ride-alongs with police have been a common and accepted custom in this country for more than 25 years. *See* Pet. Br. 42-44 (discussing cases). The only decisions cited to the contrary by respondents — *Ayeni* and *Buonocore*, *see* Resp. Br. 43-45 — were issued subsequent to the events of this case, and stand in conflict with other subsequent decisions, so that the Court has granted a writ of *certiorari* to address the constitutional issue for the first time in this case and in *Wilson v. Layne*, No. 98-83. The briefing submitted in these cases demonstrates that the constitutional issue remains quite unsettled, with judges, lawyers, and commentators plausibly defending very different positions.[5]

---

[5] Indeed, as petitioners noted in their opening brief, the situation here is one where "disparate decisions in various Circuits might leave the law insufficiently certain" to be "clearly established." *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997). That is particularly true where, as here, the constitutional issue has created a clear divide among the circuit courts, with the Eighth Circuit and the Fourth Circuit squarely disagreeing with the Second Circuit and the Ninth Circuit. *See* Pet. Br. 44-48.

Under *Mitchell*, petitioners are entitled to their defense of qualified immunity, for "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted." 472 U.S. at 535. The officers here, and all other public officials, cannot "reasonably have been expected to be aware of a constitutional right that has not yet been declared." *Procunier v. Navarette*, 434 U.S. 555, 565 (1978).

B. Qualified Immunity Is Proper Under *Anderson v. Creighton* Where It Was Not Apparent that Petitioners Violated the Fourth Amendment.

Even when the law is clearly established as a general matter (which it was not here), qualified immunity is proper if the application of that law to the facts of a particular case would not clearly indicate that the law has been violated. In other words, the contours of the alleged constitutional right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," and thus it "must be apparent" that the situation confronted in a given case comes within the boundaries of the general rule. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987).

The Fourth Circuit articulated the nub of this issue in its *en banc* opinion in *Wilson*: even if respondents' version of the law — that petitioners violate the Fourth Amendment by permitting "third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them" — had been clearly established at the time, "we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule." 141 F.3d at 118. There are many reasons why reasonable law enforcement officers "could have believed that permitting the reporters to observe and photograph the execution of the arrest warrant advanced a legitimate law enforcement purpose related

to the execution of the warrant," including publicizing their efforts to fight crime, making an accurate record of the events, and facilitating accurate media coverage of law enforcement. *Id.*; *see also* Pet. Br. 22-29.

Respondents insist that the media's presence served no legitimate law enforcement purpose in this case, *see* Resp. Br. 22, 26, 33, but their bare assertion in this regard is unpersuasive. Again, the *Wilson* court correctly emphasized the importance of "the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose." 141 F.3d at 118. At the time petitioners acted, "a reasonable officer could have believed" that the media could properly accompany him in light of "the information the searching officers possessed." *Anderson*, 483 U.S. at 641.

One important piece of information available to petitioners at the time was the Justice Department's media policy, which endorsed the practice of allowing officers to "assist the news media in photographing, taping, recording, or televising a law enforcement activity." *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-.000, section VII(B) (Assisting the News Media) (as amended Jan.14, 1993) (Pet. Br. App.). The stated rationale for this policy was precisely to "promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence," which confirms that it would have been reasonable for petitioners to believe that the presence of the media would serve these aims. *Id.* Moreover, since petitioners were merely implementing the terms of that policy, which had not been disapproved or even challenged in any court, they are entitled to qualified immunity in this case. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (qualified immunity for officers who implemented established policy never before invalidated), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir.

1986) (officers "simply implementing an established policy" are entitled to qualified immunity); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (officers who followed policy laid down by superiors and not found improper by any court have qualified immunity), *cert. denied*, 451 U.S. 969 (1981).[6]

Because petitioners could have made and did make a reasonable, good-faith judgment that their conduct in allowing the media to accompany them and to observe and record their execution of this search warrant did not violate the Fourth Amendment, the Court should uphold their defense of qualified immunity in this case.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded with instructions to dismiss the *Bivens* claim brought against petitioners.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Counsel for Petitioners

March 1999

---

[6] The certitude with which a later court may ultimately reach its own conclusion on the merits of the underlying claim of substantive right should have no effect on its analysis of the qualified immunity issue. Government officials are shielded by qualified immunity unless the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818.

Supreme Court, U. S.
FILED
DEC 28 1998
CLERK

Nos. 97-1927 and 98-83

In the Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,
Respondents.

CHARLES WILSON, GERALDINE WILSON, AND RACHEL SNOWDEN, NEXT FRIEND/MOTHER OF VALENCIA SNOWDEN, A MINOR,
Petitioners,

v.

HARRY LAYNE, JAMES A. OLIVIO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, AND BRIAN E. ROYNESTAD,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits

---

BRIEF *AMICI CURIAE* OF ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS IN NO. 97-1927 AND RESPONDENTS IN NO. 98-83.

(Additional Amici Listed on Inside Cover)

LEE LEVINE
Counsel of Record
JAMES E. GROSSBERG
JAY WARD BROWN
LEVINE SULLIVAN & KOCH, L.L.P.
1050 Seventeenth Street N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
Counsel for Amici Curiae
(Additional counsel listed on inside pages)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3018

A.H. BELO CORPORATION;
ALLIED DAILY NEWSPAPERS OF WASHINGTON, INC.;
AMERICAN SOCIETY OF NEWSPAPER EDITORS;
THE ASSOCIATED PRESS;
CALIFORNIA NEWSPAPER PUBLISHERS
ASSOCIATION; CBS BROADCASTING INC.;
THE COPLEY PRESS, INC.; DOW JONES & CO., INC.;
FOX TELEVISION STATIONS, INC.;
GANNETT CO., INC.; THE HEARST CORPORATION;
KING WORLD PRODUCTIONS, INC.;
THE LOS ANGELES TIMES;
MAGAZINE PUBLISHERS OF AMERICA, INC.;
THE McCLATCHY COMPANY;
NATIONAL ASSOCIATION OF BROADCASTERS;
NATIONAL BROADCASTING COMPANY, INC.;
NEWSPAPER ASSOCIATION OF AMERICA, INC.;
THE NEW YORK TIMES COMPANY; THE ORANGE
COUNTY REGISTER, A DIVISION OF FREEDOM
COMMUNICATIONS, INC.; THE REPORTERS
COMMITTEE FOR FREEDOM OF THE PRESS;
TRIBUNE COMPANY; UNIVISION COMMUNICATIONS,
INC.; THE WASHINGTON POST; AND WASHINGTON
STATE ASSOCIATION OF BROADCASTERS

Of Counsel:

HENRY S. HOBERMAN
JEFFREY D. FROST
ABC, INC.
77 West 66th Street
New York, New York 10023
(212) 456-6371
Counsel for ABC, Inc.

MICHAEL MCCARTHY
A.H. BELO CORPORATION
400 South Record Street
Dallas, Texas 75202
(214) 977-8249
Counsel for A.H. Belo Corporation

RICHARD M. SCHMIDT, JR.
KEVIN M. GOLDBERG
COHN AND MARKS
1920 N Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 293-3860
Counsel for the American Society of Newspaper Editors

RICHARD N. WINFIELD
ROGERS & WELLS
200 Park Avenue
New York, New York 10017
(212) 878-8233
Counsel for The Associated Press

THOMAS NEWTON
JAMES W. EWERT
CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
1225 8th Street, Suite 260
Sacramento, California 95814
(916) 443-5991
Counsel for California Newspaper Publishers Association

SUSANNA M. LOWY
CBS BROADCASTING INC.
51 West 52nd Street
New York, New York 10016
(212) 975-8758
Counsel for CBS Broadcasting Inc.

HAROLD W. FUSON, JR.
JUDITH L. FANSHAW
THE COPLEY PRESS, INC.
7776 Ivanhoe Avenue
Post Office Box 1530
La Jolla, California 92037-1530
(619) 454-0411
Counsel for The Copley Press, Inc.

STUART D. KARLE
DOW JONES & CO., INC.
200 Liberty Street
New York, New York 10281
(212) 416-2000
Counsel for Dow Jones & Co., Inc.

GERALD FRIEDMAN
DENNIS F. HERNANDEZ
FOX TELEVISION STATIONS, INC.
1999 South Bundy Drive
Los Angeles, California 90025
(310) 584-3340
Counsel for Fox Television Stations, Inc.

BARBARA WARTELLE WALL
GANNETT CO., INC.
1100 Wilson Boulevard
Arlington, Virginia 22234
(703) 284-6951
Counsel for Gannett Co., Inc.

ROBERT J. HAWLEY
THE HEARST CORPORATION
959 8th Avenue
New York, New York 10019
(212) 649-2050
Counsel for The Hearst Corporation

RALPH E. GOLDBERG
KING WORLD PRODUCTIONS, INC.
1700 Broadway
New York, New York 10019
(212) 315-4000
Counsel for King World Productions, Inc.

KARLENE W. GOLLER
THE LOS ANGELES TIMES
Times Mirror Square
Los Angeles, California 90053
(213) 237-3760
Counsel for
The Los Angeles Times

JERRY S. BIRENZ
SLADE R. METCALF
c/o MAGAZINE PUBLISHERS OF AMERICA, INC.
919 Third Avenue
New York, New York 10022
(212) 692-4457
Counsel for
Magazine Publishers of America, Inc.

KAROLE MORGAN-PRAGER
DEBRA O. FOUST
THE MCCLATCHY COMPANY
2100 Q Street
Sacramento, California 95816
(916) 321-1826
Counsel for
The McClatchy Company

HENRY L. BAUMANN
JACK N. GOODMAN
STEVEN A. BOOKSHESTER
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036-2891
(202) 429-5430
Counsel for
National Association of Broadcasters

JON FINE
NATIONAL BROADCASTING COMPANY, INC.
30 Rockefeller Plaza
New York, New York 10112
(212) 664-4444
Counsel for
National Broadcasting Company, Inc.

DAVID S.J. BROWN
RENÉ P. MILAM
NEWSPAPER ASSOCIATION OF AMERICA, INC.
1921 Gallows Road, Suite 600
Vienna, Virginia 22182-3900
(703) 902-1815
Counsel for
Newspaper Association of America, Inc.

GEORGE FREEMAN
THE NEW YORK TIMES COMPANY
229 West 43rd Street
New York, New York 10036
(212) 556-1558
Counsel for
The New York Times Company

JANE E. KIRTLEY
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
Suite 1910
1101 Wilson Boulevard
Arlington, Virginia 22209
(703) 807-2100
Counsel for
The Reporters Committee for Freedom of the Press

DALE M. COHEN
CHARLES J. SENNET
TRIBUNE COMPANY
435 North Michigan Avenue
Chicago, Illinois 60611
(312) 222-3232
Counsel for Tribune Company

SYLVIA R. ESQUIVEL
RACHELLE MARIE BIN
UNIVISION COMMUNICATIONS, INC.
6701 Center Drive West
Los Angeles, California 90045
(310) 338-0700
Counsel for Univision Communications, Inc.

MARY ANN WERNER
THE WASHINGTON POST
1150 15th Street, N.W.
Washington, D.C. 20071
(202) 334-6000
Counsel for
The Washington Post

MARK ALLEN
WASHINGTON STATE ASSOCIATION OF BROADCASTERS
724 Columbia Street, N.W.
Suite 310
Olympia, Washington 98501-1249
(360) 705-0774
Counsel for
Washington State Association of Broadcasters

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A RULE THAT IT IS UNREASONABLE *PER SE* TO PERMIT THE PRESS TO OBSERVE THE EXECUTION OF A SEARCH WARRANT WILL UNNECESSARILY DEPRIVE THE PUBLIC OF VALUABLE INFORMATION ABOUT THE FUNCTIONING OF ITS GOVERNMENT 3

II. A *PER SE RULE* IGNORES THE COURTS' CONSTITUTIONAL OBLIGATION TO BALANCE COMPETING INTERESTS, INCLUDING THE PUBLIC'S NEED TO INFORM ITSELF ABOUT THE CONDUCT OF LAW ENFORCEMENT OFFICIALS 6

CONCLUSION 10

APPENDIX A:

Identity of Individual *Amici Curiae* 1a

TABLE OF AUTHORITIES

CASES — page

Anderson v. WROC-TV, 441 N.Y.S.2d 220 (Sup. Ct. 1981) 9
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994) 3, 8, 9
Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997) ..2, *passim*
Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) 4
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 6
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5
Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976) 9
Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 6, 7
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) 7
Hagler v. Philadelphia Newspapers, Inc., 24 Media L. Rep. (BNA) 2332 (E.D. Pa. July 12, 1996).. 4
Harris v. United States, 331 U.S. 145 (1947), *overruled in part on other grounds, Chimel v. California*, 395 U.S. 752 (1969) 7
Kleindienst v. Mandel, 408 U.S. 753 (1972) 6
Maryland v. Wilson, 117 S. Ct. 882 (1997) 7
Miller v. National Broadcasting Co., 232 Cal. Rptr. 668 (Ct. App. 1986) 9
Mills v. Alabama, 384 U.S. 214 (1966) 6
NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 2
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997) 4
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 7
Prahl v. Brosamle, 295 N.W.2d 768 (Wis. Ct. App. 1980) 9
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 6, 8
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996) 4
Terry v. Ohio, 392 U.S. 1 (1968) 6
United States v. Place, 462 U.S. 696 (1983) 7

TABLE OF AUTHORITIES—Continued

page

Wilson v. Arkansas, 514 U.S. 927 (1995) 7
Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998)..3, *passim*

STATUTE

28 U.S.C. § 2679(b)(1) 9

OTHER AUTHORITIES

J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (1827) 8

In the Supreme Court of the United States

OCTOBER TERM, 1998

Nos. 97-1927 and 98-83

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, AND ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER AND ERMA R. BERGER,
Respondents.

CHARLES WILSON, GERALDINE WILSON, AND RACHEL SNOWDEN, NEXT FRIEND/MOTHER OF VALENCIA SNOWDEN, A MINOR,
Petitioners,

v.

HARRY LAYNE, JAMES A. OLIVIO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, AND BRIAN E. ROYNESTAD,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Ninth and Fourth Circuits

---

BRIEF *AMICI CURIAE* OF ABC, INC., *ET AL.* IN SUPPORT OF PETITIONERS IN NO. 97-1927 AND RESPONDENTS IN NO. 98-83

INTEREST OF THE *AMICI CURIAE*[1]

Amici and their members are publishers, broadcasters, editors and reporters working throughout the United States to gather news and information and to disseminate it to the American public by, among other means, observing public officials—including law enforcement officers—as they perform their governmental functions. *See* Appendix A *infra*. The decision below in *Berger v. Hanlon* effectively condemns this form of news reporting and, unless reversed by this Court, will impair the role of *amici* in "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

SUMMARY OF ARGUMENT

In *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), the Ninth Circuit has held that, for all practical purposes, the news media's presence during the execution of a search warrant is *per se* unreasonable and, therefore, a violation of the Fourth Amendment. In so holding, the Ninth Circuit has unnecessarily degraded the public's interest—long-recognized by this Court as one of constitutional dimension—in monitoring the work of its law enforcement institutions. By observing and recording first-hand the activities of government officials charged with enforcing the law, including the execution of search warrants, the news media afford the public a unique window through which to observe the conduct of those officials, the operation of the statutes and ordinances they enforce, and the social conditions they confront. If the *per se* rule embraced in *Berger*, and endorsed by the dissenters in *Wilson*

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief *amici curiae* has been filed with the Clerk of the Court, as required by Supreme Court Rule 37.3(a).

v. Layne, 141 F.3d 111, 119 (4th Cir. 1998) (en banc) (Murnaghan, J., dissenting), is adopted by the Court, this window will effectively be closed.

To be sure, the search or seizure of a citizen's home, person, papers or other possessions by agents of the government may intrude substantially upon that citizen's privacy, and the consequences of the abuse of such power may be profound. Yet, the Ninth Circuit's *per se* rule would eliminate a most effective means by which the public may observe this invocation of governmental authority and thereby prepare itself to confront such abuses. A *per se* rule affords no weight at all to this important interest in striking the constitutional balance with the incremental diminution of privacy that may result from the news media's presence at a warrant's execution. Accordingly, this Court should reverse the judgment in *Berger*, affirm the judgment in *Wilson*, and decline to hold that law enforcement officers *necessarily and always* violate the Fourth Amendment by permitting the news media to observe and record their activities.

ARGUMENT

I. A RULE THAT IT IS UNREASONABLE *PER SE* TO PERMIT THE PRESS TO OBSERVE THE EXECUTION OF A SEARCH WARRANT WILL UNNECESSARILY DEPRIVE THE PUBLIC OF VALUABLE INFORMATION ABOUT THE FUNCTIONING OF ITS GOVERNMENT

In *Berger v. Hanlon*, the Ninth Circuit held that, although the search at issue there comported with the Constitution in all other respects, *see* 129 F.3d at 509, it nevertheless violated the Fourth Amendment because the news media accompanied and observed law enforcement officials as they executed a warrant, *see id.* at 510-11.[2] In contrast, five members of the *en banc* majority in

[2] *See also Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that "an objectively reasonable officer could not have concluded

Wilson v. Layne determined that "reasonable law enforcement officers might conclude" that permitting newspaper reporters "to observe and photographically record the execution of an arrest warrant" would serve, *inter alia,* the salutary purpose of "facilitating accurate reporting that improves public oversight of law-enforcement activities." 141 F.3d at 116.[3]

The Ninth Circuit's holding, if adopted by this Court, will have one certain consequence: To avoid the risk that they will be deemed to have violated the Fourth Amendment, law enforcement and other public officials performing their duties will simply bar the public, through the news media, from observing their activities in a variety of settings. Such a regime will eliminate a class of news reporting that has contributed meaningfully to public scrutiny of official conduct. First-hand observations by the public, through the news media, of law enforcement searches and seizures—ranging from police raids on "crack houses," to inspections by fire marshals of overcrowded sweat shops, to health department examinations of roach-infested restaurant kitchens—provide the public with a

that inviting a television crew—or any third party not providing assistance to law enforcement—to participate in a search was in accordance with Fourth Amendment requirements"); *Hagler v. Philadelphia Newspapers, Inc.*, 24 Media L. Rep. (BNA) 2332, 2334 (E.D. Pa. July 12, 1996) (adopting and quoting reasoning in *Ayeni*); *but see Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing *Ayeni* for its "failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

[3] *See also Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (concluding that it is not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a warrant"), *cert. denied*, 117 S. Ct. 1081 (1997); *Stack v. Killian*, 96 F.3d 159 (6th Cir. 1996) (where warrant made no mention of news media but authorized police to videotape search, subject's rights were not violated when police invited news media along and permitted them to make their own videotape of search).

rare opportunity to monitor and evaluate the conduct of these officials.[4] Such reporting informs the public, in a way no other kind of journalism realistically can, about the assertedly unlawful conduct at which enforcement efforts are directed,[5] the difficulties and dangers facing law enforcement officers,[6] the legal restrictions that confine their discretion, and the social ills they seek to redress.[7]

This Court has repeatedly recognized that our constitutional democracy presupposes and, indeed, requires an informed public. As the Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *First National Bank of Boston v.*

[4] *See, e.g., ABC News Turning Point: Solving Murder Kansas City Style* (ABC television broadcast, June 29, 1994) (observing work of detective squad for one month as means of reporting on ability of police to solve murders); *CBS News Special: 48 Hours on Crack Street* (CBS television broadcast, Sept. 2, 1986) (observing law enforcement officers during two-day period to document how they grapple with "crack" cocaine problem).

[5] *See, e.g., Prime Time Live: Sorry, Wrong Number* (ABC television broadcast, Sept. 25, 1996) (observation of state and federal agents investigating scheme involving cell phones programmed with stolen identification numbers and methods for consumers to avoid them).

[6] *See, e.g.*, Gordon Dillow, *Fuhrman's Fallout Makes Streets That Much Meaner For LAPD*, Orange County Register, Sept. 10, 1995, at A1 (reporter who accompanied policeman on duty documented reactions of citizens to law enforcement officers); Jeff Leeds & Nicholas Riccardi, *Missing Molester Tracked Down*, L.A. Times, Jan. 31, 1997, at B1 (reporter who accompanied police on execution of arrest warrant documented obstacles to location and apprehension of sex offenders).

[7] *See, e.g., CNN Special Assignment: The Misery Trade* (CNN television broadcast, Dec. 5, 1993) (CNN journalists who accompanied law enforcement officers on raids of sweat shops documented illegal conditions to which unskilled laborers were subjected).

Bellotti, 435 U.S. 765, 783 (1978). "In a variety of contexts, this Court has referred to a First Amendment right to 'receive information and ideas.' " *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972). To secure that right, the American public "relies necessarily upon the press" to inform it about the conduct of government. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

News reporting about the operations of government officials charged with administering the law provides both a catalyst and the raw material for the " 'free discussion of governmental affairs.' " *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The *per se* rule adopted by the Ninth Circuit and embraced by the dissenters in *Wilson* would effectively eliminate an important journalistic tool and reduce the stock of information necessary "to ensure that the individual citizen can effectively participate in . . . our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604. Such a result, this Court has emphasized, will inevitably breed unnecessary distrust. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980) (Burger, C.J., announcing judgment).

II. A *PER SE* RULE IGNORES THE COURTS' CONSTITUTIONAL OBLIGATION TO BALANCE COMPETING INTERESTS, INCLUDING THE PUBLIC'S NEED TO INFORM ITSELF ABOUT THE CONDUCT OF LAW ENFORCEMENT OFFICIALS

The Fourth Amendment prohibits " 'not all searches and seizures,' " but only those that are " 'unreasonable.' " *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted). Ultimately, what is "reasonable" for Fourth Amendment purposes "depends 'on a balance between the public interest and the individual's right to personal security free from

arbitrary interference by law officers.' " *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (citation omitted). This Court has cautioned that "[t]he test of reasonableness cannot be stated in absolute terms. 'Each case is to be decided on its own facts and circumstances.' " *Harris v. United States*, 331 U.S. 145, 150 (1947) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)), *overruled in part on other grounds, Chimel v. California*, 395 U.S. 752 (1969); *see also Wilson v. Arkansas*, 514 U.S. 927 (1995).

Similarly, this Court has assessed with skepticism rigid rules that restrict the free flow of information about the workings of government and its officials in the name of personal privacy. In *Globe Newspaper Co. v. Superior Court*, for example, the Court rejected a *"mandatory* closure rule" applicable to the trial testimony of minor victims of sexual assaults. 457 U.S. at 607-08 (emphasis in original). Although the Court acknowledged that the rule's purpose—"safeguarding the physical and psychological well-being of a minor—is a compelling one," it added that "it is clear that the circumstances of the particular case may affect the significance of the interest." *Id.* (footnote omitted). As the Court explained, "[a] trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim." *Id.* at 608. Thus, contrary to the reasoning of the *Berger* panel and the *Wilson* dissenters, privacy interests protected by the Fourth Amendment do not demand a rule that the news media's presence during the execution of a warrant is *always* unreasonable, and First Amendment considerations as well counsel that the courts should determine the issue in light of " 'all the circumstances.' " *Maryland v. Wilson*, 117 S. Ct. 882, 884-85 (1997) (citation omitted).

At bottom, the Fourth Amendment is directed against the exercise of unchecked *governmental* power. *United States v. Place*, 462 U.S. 696, 706-07 (1983). The *per se* rule endorsed by the Ninth Circuit would, in many

circumstances, eliminate the only means by which the press and public can monitor abuses of that power first-hand. Concededly, media representatives are typically permitted to observe searches and seizures only at the sufferance of law enforcement officials. Even this limited opportunity for oversight—undertaken in a manner otherwise consistent with the dictates of the Fourth Amendment—is preferable to the alternative endorsed by the *Berger* panel and the *Wilson* dissenters: no possibility of any oversight at all. The information obtained by the American public from first-hand news accounts of law enforcement activity expands the base of knowledge upon which the public can evaluate claims of official impropriety. *See Wilson v. Layne*, 141 F.3d at 116 (noting reasonableness of proposition that, as a general matter, media observation and recording of execution of warrants "deters . . . improper conduct by law enforcement officers"). As this Court has observed on countless occasions, " '[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.' " *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 569 (Burger, C.J., announcing judgment) (quoting J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

Amici do not contend that the presence of news media representatives during the execution of a warant is *never* relevant to whether a Fourth Amendment violation has occurred.[8] Nevertheless, for the foregoing reasons, a rule

[8] For example, in contrast to the cases now before the Court, in *Ayeni v. Mottola*, the Second Circuit found that six government agents without a warrant "pushed" their way into an apartment past a night-gown clad woman and a small child and began searching bedroom closets for evidence of credit card fraud allegedly perpetrated by the woman's husband, who was not present. 35 F.3d at 683. Some time later, four more agents armed with a warrant arrived, accompanied by a camera crew. The court found that Mrs. Ayeni objected to the presence of the camera and, when she tried to shield her son's face with a magazine, a government agent snatched it out of her hand and told her to "shut up." *Id.* According to the Second Circuit, one of the government agents then "directed" the camera crew to videotape Mrs. Ayeni's face while she was being interrogated and the cameraman complied. *Id.* Significantly, in neither of the cases before this Court did the news media permit their staff or equipment to be "directed" by government agents.

that such activities *always* violate the Fourth Amendment is neither constitutionally required nor justified. The mere observation and recording of a search by the news media, and subsequent public dissemination of what was observed, should not—without more—constitute a violation of the Fourth Amendment.[9]

[9] Even under those circumstances in which the Constitution does not preclude law enforcement officials from authorizing the news media to accompany them while executing a warrant, an aggrieved citizen remains free to assert whatever protections may be available under state tort law, including—in appropriate circumstances—causes of action for trespass or invasion of privacy. *See, e.g., Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668 (Ct. App. 1986) (permitting trespass and invasion of privacy claims against reporter who accompanied paramedics into private home during emergency medical call); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981) (permitting trespass claim against reporters who accompanied investigator as he executed search warrant); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (reinstating claim for trespass against reporter who accompanied law enforcement officers into private home during arrest); *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976) (observing that, in absence of consent, person injured by news media's entry into home with officials following fatal fire could maintain claims for trespass and invasion of privacy, but finding implied consent from evidence at issue in case); *see also* 28 U.S.C. § 2679(b)(1) (providing that persons whose property has been injured or lost, or who have suffered personal injury as result of negligent or wrongful act of federal employee may bring damage claim against United States). Indeed, the Ninth Circuit remanded for further proceedings the trespass claims asserted in *Berger v. Hanlon*, an aspect of its decision that is not before this Court for review. *See* 129 F.3d at 517.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment in No. 97-1927 be reversed and that the judgment in No. 98-83 be affirmed.

Respectfully submitted,

LEE LEVINE
Counsel of Record
JAMES E. GROSSBERG
JAY WARD BROWN
LEVINE SULLIVAN &
KOCH, L.L.P.
1050 Seventeenth Street N.W.
Suite 800
Washington, D.C. 20036
(202) 508-1100
Counsel for Amici Curiae

APPENDIX

APPENDIX A

IDENTITY OF INDIVIDUAL *AMICI CURIAE*

ABC, Inc., an indirect wholly-owned subsidiary of The Walt Disney Company, is a broad-based communications company with significant holdings here and abroad. It alone, or through its subsidiaries, owns the ABC Television Network, ten television stations and 34 radio stations.

A.H. Belo Corporation, a publicly-traded (NYSE) company, has numerous wholly-owned subsidiaries, including subsidiaries which operate the *Riverside Press-Enterprise* newspaper in Riverside, California, and KXTV in Sacramento, California; KING-TV in Seattle and KREM-TV in Spokane, Washington; and KGW-TV in Portland, Oregon.

Allied Daily Newspapers of Washington, Inc. ("Allied") is a Washington nonprofit corporation owned and operated by the 25 daily newspapers in the State of Washington, including all traditional, daily newspapers of general circulation. Allied's offices are located in Olympia, Washington. One of Allied's primary purposes is to monitor media law and join in briefs on behalf of members in courts or before administrative agencies.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded over seventy-five years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of this country with complete and accurate re-

ports of the affairs of government—be they executive, legislative, or judicial.

The Associated Press ("AP"), a not-for-profit mutual news cooperative organized under the New York Not-For-Profit Corporation Law, is headquartered in New York City. The members of AP are newspapers, television stations and radio stations. Founded in 1848, and now the oldest and largest newsgathering organization in the world, AP engages in the collection of news from and distribution of news to its members.

The California Newspaper Publishers Association ("CNPA") represents approximately 500 daily and weekly newspaper members and for over 100 years has stood for the right of every individual to participate in the constitutional guarantee of freedom of expression.

CBS Broadcasting Inc., a New York corporation, is engaged in the business of producing and broadcasting nationally news and public affairs programming, and operating television and radio stations.

The Copley Press, Inc. publishes *The San Diego Union-Tribune* and other newspapers in California and Illinois, whose combined daily circulation exceeds 750,000 copies. Copley's newspapers range from a small desert semi-weekly to a large metropolitan daily, all of which serve readers intensely interested in the conduct of law enforcement agencies.

Dow Jones & Co., Inc., is the publisher, *inter alia,* of *The Wall Street Journal,* a national newspaper published each business day, the Dow Jones Financial News Services, real-time, 24-hour newswires distributed electronically to subscribers, *Barron's,* a weekly newspaper of business and finance, and, through its Ottaway Newspaper, Inc. subsidiary, 19 daily and 18 weekly newspapers.

Fox Television Stations, Inc. owns and operates 22 television stations in major markets, including KTTV in

Los Angeles. Twenty-one of the Fox television stations broadcast local news and news-related programs several times daily, which are an integral part of their schedule.

Gannett Co., Inc. is a nationwide news and information company that operates 21 television stations, which broadcast to over 16% of the U.S. Publishing 75 daily newspapers, including *USA Today*, Gannett is the nation's largest newspaper group in terms of circulation. In addition, Gannett owns a number of non-daily publications, including *USA Weekend,* a newspaper magazine, and a national wire service.

The Hearst Corporation is a diversified privately held communications company that publishes newspapers, consumer magazines, books and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces movies and other programming for television and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

King World Productions, Inc. is a leading worldwide distributor of television programming. King World produces and distributes the daily television news program "Inside Edition," which is broadcast by television stations located throughout the United States.

The Los Angeles Times is the nation's largest daily metropolitan newspaper with a circulation of more than 1,095,000 daily and 1,385,000 on Sunday.

Magazine Publishers of America, Inc. ("MPA") is a national trade association including in its present membership approximately 200 domestic magazine publishers who publish over 1200 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature,

religion, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.

The McClatchy Company publishes 11 daily newspapers and 13 community newspapers in California, Washington, Alaska, Minnesota, North Carolina and South Carolina, including *The Sacramento Bee, The News Tribune* in Tacoma, the *Anchorage Daily News,* the *Star Tribune* in Minneapolis, *The News & Observer* in Raleigh, and *The Herald* in Rock Hill. The newspapers have a combined average paid circulation of 1,364,000 daily and 1,855,000 Sunday.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. NAB's members cover, produce and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public interest and concern.

National Broadcasting Company, Inc. ("NBC") operates a national television network of more than 200 affiliates and 13 owned-and-operated stations that broadcast its programming throughout the United States. NBC reports on matters of general public concern through its Network News Division (which produces, among other programming, *Nightly News with Tom Brokaw, Today,* and *Dateline NBC*) as well as its cable news networks, MSNBC and CNBC.

The Newspaper Association of America, Inc. ("NAA") is a nonprofit organization representing the interests of more than 1,700 newspapers in the United States and Canada. Most NAA members are daily newspapers, accounting for approximately 87 percent of the U.S. daily newspaper circulation. One of NAA's key strategic priorities is to advocate and support newspapers' First Amend-

ment interests, including the ability to gather and report news and information of public concern.

The New York Times Company publishes *The New York Times, The Boston Globe* and 21 other newspapers. The Company also owns eight television stations and a number of sports magazines.

The Orange County Register, a division of Freedom Communications, Inc., publishes a daily newspaper in Santa Ana, California, with a circulation of more than 350,000.

The Reporters Committee for Freedom of the Press is a voluntary unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance and research in virtually every major press freedom case that has been litigated in the United States since 1970.

Tribune Company is a diversified news, information and entertainment company based in Chicago. Among other things, it operates sixteen television stations, four radio stations and a regional cable news service, it publishes four daily newspapers, and produces nationally-syndicated radio and television programs.

Univision Communications Inc. is the leading Spanish language television broadcaster in the United States. Univision owns and operates 13 full power stations in major markets, including Los Angeles, San Francisco, New York, Chicago and Miami. In addition, Univision owns and operates eight low power stations. More than two-thirds of Hispanics in the United States speak Spanish in the home. News broadcasts are a vital component of Univision's overall television programming and it is expected that Univision will continue to be the leading source of news for Hispanic Americans.

The Washington Post, a daily newspaper of general circulation primarily in Virginia, Maryland and Washington, D.C., is a division of The Washington Post Company, a communications company that owns publications and broadcast properties engaged in newsgathering and reporting.

The Washington State Association of Broadcasters represents all of the radio and television stations licensed to communities within the State of Washington. The Association represents broadcasters' news reporters on issues relating to their ability to report on issues of public importance. An adverse ruling in this case would significantly impair the ability of news reporters of broadcast stations in Washington State to cover issues surrounding effective law enforcement within their communities. Law enforcement activities constitute a substantial portion of the news covered by broadcast journalists in Washington and, as such, these issues are likely to arise on a continuing basis.

(7)

Supreme Court, U.S.
FILED
JAN 26 1999
CLERK

No. 97-1927

In the

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Pacific Legal Foundation

2488

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, petitioners are nonetheless entitled to a defense of qualified immunity?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES CITED iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. ANY UNNECESSARY INTRUSION IN THE EXECUTION OF A WARRANT VIOLATES FOURTH AMENDMENT PRIVACY RIGHTS 6

A. Fourth Amendment Values Dictate That Governmental Intrusions Be Minimal and Reasonably Necessary to the Execution of the Warrant 6

B. Media Involvement in the Execution of a Warrant Maximizes the Intrusion 14

II. THE PURPORTED ACCOMPLISHMENT OF SOME LAW ENFORCEMENT PURPOSE DOES NOT JUSTIFY THE EXPANDED INTRUSION OF THE NEWS MEDIA IN OBSERVING AND RECORDING THE EXECUTION OF A WARRANT 16

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Page

Cases

Andersen v. Maryland, 427 U.S. 463 (1976) 9, 11

Ayeni v. Mottola, 35 F.3d 680 (2nd Cir. 1994) 7, 9-10, 12, 16-20

Berger v. Hanlon, 129 F 3d 505 (9th Cir. 1997) 11-13, 15-17

Boyd v. United States, 116 U.S. 616 (1886) 8

Branzburg v. Hayes, 408 U.S. 665 (1972) 19

Buencore v. Harris, 656 F3d. 347 (4th Cir. 1995) 13

Burdett v. Abbot, 104 Eng. Rep. 501 (K.B.1811) 13

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 9

Johnson v. United States, 333 U.S. 10 (1948) 13

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 18-19

Michigan v. Summers, 452 U.S. 692 (1981) 12

Payton v. New York, 445 U.S. 573 (1980) 8-9, 12-13

Silverman v. United States, 365 U.S. 505 (1961) 6-7

Semayne's Case, 77 ENG. REP., No. 194 (K.B. 1604) 6, 13

Stanford v. Texas, 379 U.S. 476 (1965) 8

Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) 7

Wilson v. Layne, 141 F.3d 111 (4th Cir. 1998) 6, 12, 16-17, 20

TABLE OF AUTHORITIES—Continued

Page

United States Constitution

Fourth Amendment ..... *passim*

Sixth Amendment 18

Federal Statutes

18 U.S.C. § 3105 ..... 9, 12, 16

Rules

Supreme Court Rule 37 1

Rule 37.6 1

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Respondents, Paul and Erma Berger. Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California for the purpose of litigating important matters of public interest. PLF has thousands of supporters nationwide and advocates a balanced approach to dealing with public interest issues. PLF supports the concept of limited government and believes public officials must be respectful of the constitutional rights of those whom they serve. Law enforcement personnel have a duty not only to execute the law, but also to protect the civil rights of citizens. Police action that is excessive or unduly intrusive undermines individual liberty and is intolerable in a free society.

This case is a singular example of government excess and intrusion into the privacy of individuals. It calls into question the fundamental protections afforded the people in the Fourth Amendment to the United States Constitution. How this Court answers the questions raised by this case will determine the expectation of privacy we have in our very homes. A consideration of a broad spectrum of perspectives is, therefore, warranted. Pacific Legal Foundation has a long history of amicus participation in this Court and believes its public policy perspective on balancing the needs of law enforcement with individual liberty will provide a necessary viewpoint on the issues presented in this case.

---

[1] Pursuant to Supreme Court Rule 37.6, amicus Pacific Legal Foundation states that no counsel for a party to this action authorized any portion of this brief and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Paul and Erma Berger own a ranch in Montana. In 1993, disgruntled former employees of the Bergers reported to the United States Fish and Wildlife Service (Service) that they had seen Mr. Berger poison protected eagles. An investigation ensued that came to the attention of the media. Reporters for Cable News Network (CNN) approached agents of the Service to work out a television deal. The media wanted footage for their television program "Earth Matters," and the Service wanted publicity of its environmental law enforcement efforts. An Assistant United States Attorney signed a contract with CNN authorizing CNN reporters to accompany United States agents as they executed a criminal search warrant on the Bergers' ranch. Under this contract, CNN would retain exclusive editorial control of any video and voice recordings of the event.

In March, 1993, a magistrate judge issued a sealed search warrant for the Bergers' ranch authorizing a search of all the premises, except the residence. The judge was never apprised of the media contract nor was he informed that the media would join the search. The media participated in a pre-search briefing where the media were provided details of the sealed warrant and supporting documents. At this briefing, law enforcement officers allegedly discussed with the media ways of preventing the Bergers from discovering the reporters were not government agents. On the morning of the search, CNN reporters and government agents descended on the ranch in 10 vehicles. Media cameras mounted on the inside and outside of government vehicles recorded the event. Reporters were dressed in plain clothes, indistinguishable from federal agents. A special agent for the Service was wired with a CNN microphone. As the cars came up the road, Mr. Berger drove out to meet them. Mr. Berger was told by the special agent that he would be served a warrant and that the government was authorized to search

all buildings on his property. The special agent asked if he could accompany Mr. Berger back to the ranch in Mr. Berger's truck so he could explain how the search would proceed. Mr. Berger agreed. The special agent did not tell Mr. Berger that the warrant did not include the house nor did he inform Mr. Berger that he was wearing a hidden microphone and his conversations would be recorded.

At the time of the search, Mr. Berger was 71 and Mrs. Berger was 81. Only 10 days prior, Mr. Berger had been released from the hospital after treatment for high blood pressure. He was visibly upset and naturally acquiesced when the special agent asked him if he could come into his home. Thus began an all-day search of the Berger ranch that involved threats of imprisonment if the Bergers did not cooperate, staged photo shoots, on-camera interviews by federal agents on the Berger property whereby the agents made derogatory comments about the Bergers, and planned diversions so the Bergers would not discover the presence of the media. On one occasion, Mr. Berger objected to the presence of video cameras. Federal agents responded by redirecting the cameras and interrogating the Bergers with strongly worded leading questions while surreptitiously taping the answers. Apparently, to add some drama to the affair, the Assistant United States Attorney wore an ATF hat. Although no convincing evidence was ever discovered of poisoned eagles, Mr. Berger was charged with a few felony counts of killing protected species and a misdemeanor count of using a pesticide not in accordance with its labeling. Mr. Berger was acquitted on the felonies but convicted on the misdemeanor. A highly edited version of the video and audio tapes, implying that the Bergers had killed hundreds of eagles, was aired on CNN at least 10 times and shown internationally.

The Bergers filed a civil suit against the agents and the media for violating their civil rights, trespass, and intentional infliction of emotional distress. The Ninth Circuit Court of Appeals ruled the search was patently unreasonable and held the

agents liable. The court also ruled that the media had trespassed in violation of state law and may be liable for emotional distress. The court refused to enjoin further airings of the video.

SUMMARY OF THE ARGUMENT

Any unnecessary intrusion in the execution of a warrant violates Fourth Amendment privacy rights. As this Court has stated, the principle objective of the Fourth Amendment is to protect individual privacy from government intrusion. This protection is afforded by the warrant requirement. By the Fourth Amendment's express terms, no warrant may issue except for probable cause based on sworn affidavit. The warrant must also specify with particularity the places, things, and persons to be searched or seized.

This Court has warned that public officials must take care to assure that searches and seizures are conducted so as to minimize the intrusion. This implies a limitation not only on how the warrant is executed but on who may execute it. Consequently, where warrants are required, home invasion must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. In this case, the warrant did not address media involvement because law enforcement officers withheld their media plans from the magistrate. Nor was the presence of the media determined to be reasonably necessary to the execution of the warrant. Therefore, the presence of the media unduly and substantially expanded the intrusion into the Bergers' privacy in violation of the Fourth Amendment. Fourth Amendment values dictate that governmental intrusions be minimal and reasonably necessary to the execution of the warrant.

Media involvement in the execution of a warrant maximizes the intrusion. While there were only 3 CNN reporters to the 21 law enforcement officers on the Bergers' property, their impact

on the Bergers' privacy was anything but marginal and insignificant. The audio and video tapes CNN took of the search were broadcast repeatedly to both national and international audiences. Moreover, these tapes were edited to show the Bergers as scofflaws who maliciously killed protected wildlife, although they were never convicted of such crimes. Further, federal law enforcement officers invited the media onto the Bergers' private property in violation of state trespass laws. Consequently, the impairment to the Bergers' privacy occasioned by the presence of the media could not have been greater.

Additionally, the purported accomplishment of some law enforcement purpose does not justify the expanded intrusion by the news media in observing and recording the execution of a warrant. Empirical evidence demonstrates, in this and other cases, that the presence of the media is just as likely to generate police grandstanding and misconduct as it is to deter violence and crime. Therefore, the media perform no legitimate police purpose when they accompany law enforcement officers in the execution of a warrant. Private news media coverage is not reasonably necessary to the execution of the warrant and should not be allowed.

Furthermore, the media have no more right than the general public to observe and record the execution of a warrant. They can be excluded from private property. Therefore, this Court should not allow a warrant to become a press pass. Instead, this Court should resolve that law enforcement officers must minimize impairment to the constitutionally protected right to privacy.

ARGUMENT

I

ANY UNNECESSARY INTRUSION IN THE EXECUTION OF A WARRANT VIOLATES FOURTH AMENDMENT PRIVACY RIGHTS

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const., amend. IV.

This constitutional amendment is an extension of English tradition and jurisprudence and embodies the core value that the home is sacrosanct. *See Wilson v. Layne*, 141 F.3d 111, 121 (4th Cir. 1998). In recognition of fundamental privacy and property rights, as early as the *Semayne's Case*, 77 ENG. REP., No. 194 (K.B. 1604), the King's Bench declared that the "house of every one is to him as his castle and fortress," *id.* at 195, and prohibited the government from forcibly entering a home at the behest of a private party. *Id.* at 198. It is ironic, therefore, that this Court must now decide whether the law prohibits the government from forcibly entering a home *with* a private party.

A. Fourth Amendment Values Dictate That Governmental Intrusions Be Minimal and Reasonably Necessary to the Execution of the Warrant

As this Court stated in *Silverman v. United States*, 365 U.S. 505 (1961):

> The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.

Id. at 511.

"The protection of privacy from encroachment by government officers is the 'principle' object of the [Fourth] Amendment." *Ayeni v. Mottola*, 35 F.3d 680, 684 (2nd Cir. 1994) (citing *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967)). This right of privacy is assaulted everytime the government enters private property. Is it any wonder then that the Fourth Amendment expressly prohibits unreasonable searches and seizures and requires the protection of an authorized warrant?

But if this warrant requirement is to protect against undue governmental impairment of the right of privacy and the sanctity of the home, it must have meaningful limits. The Framers of the Constitution clearly intended such limits. This warrant requirement is not like the writs of assistance that authorized agents of the Crown to search as they pleased and were so odious to the

American colonists.[2] Rather, these warrants are bounded by the exacting requirements of the Fourth Amendment.

The Framers required all warrants to be obtained on probable cause supported by sworn affidavits. To further protect individual rights of privacy and property, the Framers also required all warrants to describe with particularity the place to be searched and the persons or things to be seized. U.S. Const., amend. IV.

In recognition of these strict requirements, this Court has long recognized that an entry into the home without a warrant (with few exceptions) is per se unreasonable and, therefore, unconstitutional. *See Payton v. New York*, 445 U.S. 573, 588-90

---

[2] Writing for the Court in *Stanford v. Texas*, Justice Stewart explained:

> "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book,' because they placed 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.' 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'"

Stanford v. Texas, 379 U.S. 476, 481-82 (1965) (quoting *Boyd v. United States*, 116 U.S. 616 (1886)).

(1980); and *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

The Framers took great pains to ensure our protection from unnecessary intrusion. They saw firsthand the dangers attendant to overbearing and arbitrary government. To avoid these dangers, they drafted a Fourth Amendment designed to minimize governmental impairment of individual rights. With good reason, this Court has admonished that "responsible officials, including judicial officials, must take care to assure that [searches and seizures] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andersen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Minimizing intrusions necessarily requires a limitation on *who* may execute the warrant as well as *how* the warrant may be executed.

According to the Second Circuit in *Ayeni*:

> With respect to express authorization, a warrant identifies not only the premises that may be searched and the items that may be examined or seized, but also *the officers who are authorized to participate in the search and seizure*.

Ayeni v. Mottola, 35 F.3d at 685-56.

As a limit on those who may accompany law enforcement officers in the execution of a warrant, this interpretation of Fourth Amendment requirements has been codified in federal statutory law:

> A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person*, except in aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (emphasis added).

This straightforward statute makes clear that law enforcement officers may not bring along third parties in the execution of a warrant except in the limited circumstance where the third party is needed to aid the officers. According to the Second Circuit, the type of aid envisioned by this statute is actual assistance in conducting the search.

In *Ayeni v. Mottola*, secret service agents entered the home of Mr. and Mrs. Ayeni with a warrant to search for evidence of credit card fraud on the part of Mr. Ayeni. These agents were accompanied by a CBS television crew for "Street Stories." Mr. Ayeni was not home. However, Mrs. Ayeni, who was not a suspect, was in the home with her young son. She was clad only in a dressing gown. Mrs. Ayeni objected to the videotaping of herself and her son. At one point she even tried to avoid the CBS camera by covering her face with a magazine. Her son was crying, and he told his mother he was frightened. When Mrs. Ayeni attempted to cover her son's face with a magazine, a special agent grabbed the magazine out of her hand, threw it on the floor, and told them to "shut up." This same agent directed the camera crew to video tape Mrs. Ayeni's face while he questioned her about her husband. *Ayeni v. Mottola*, 35 F.3d at 683.

The Second Circuit found this search patently unreasonable and in clear violation of both the Fourth Amendment and statutory law. The court noted with asperity that CBS was not assisting the agents in conducting the search. "On the contrary, the officers were assisting CBS in producing a television show." *Id.* at 687. So it is in the present case.

The Assistant United States Attorney had a signed agreement with CNN to allow video and audio taping of the search at the Bergers' ranch. As in *Ayeni*, the purpose of these recordings was to provide footage for a television show and not to aid the officers in the search:

> In this case we have not only a verbal agreement, but a written contractual commitment between the government and the media to engage jointly in an enterprise that only the government could lawfully institute--the execution of a warrant--for the mutual benefit of both the private interests of the media and the government officials' interest in publicity. It is also alleged that the federal entities shared confidential information with the media. Indeed, the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment, rather than its law enforcement value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation.

Berger v. Hanlon, 129 F.3d 505, 515 (9th Cir. 1997).

The responsible officials in these cases, and many others, did not follow the admonition of this Court to "take care to assure that [searches and seizures] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *See Andersen v. Maryland*, 427 U.S. at 482 n.11. Rather, in violation of Fourth Amendment protections, the law enforcement officers did their best to *maximize* the intrusion by bringing along the media who can and will broadcast all they hear and see to the world.

Both law enforcement and judicial officers are in need of a workable standard more clearly defining the constitutional limits of searches and seizures. This Court has been asked to answer the question whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant. To comport with the intent and language of the Fourth

Amendment, the answer to that question must seek to minimize privacy intrusions.

According to the Second Circuit:

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

Ayeni, 35 F.3d at 688.

This is a workable standard and one not inconsistent with Supreme Court jurisprudence. *See Payton v. New York*, 445 U.S. at 602-03; and *Michigan v. Summers*, 452 U.S. 692, 705 (1981). Moreover, this standard is endorsed by the Ninth Circuit in this case (*see Berger*, 129 F.3d at 510-11) and the dissent in *Wilson* (*see Wilson v. Layne*, 141 F.3d at 119). This standard is also impliedly codified in 18 U.S.C. § 1305. Fourth Amendment values dictate that forcibly executed invasions of private property under purported authority of government warrants be minimal and reasonably necessary to the execution of the warrant.

Although law enforcement officers require some latitude in the execution of a warrant, the requirement that the invasion be grounded in the express terms of the warrant prevents government overreaching and protects core Fourth Amendment values. As this Court has stated:

> The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security

> and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Payton v. New York, 445 U.S. at 586 n.24 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

In *Berger*, law enforcement officers obtained a warrant to search the Berger property without disclosing the media contract, the planned presence of the press, or the media's purpose. Therefore, the warrant did not expressly address media involvement in the execution of the warrant, either as active participants or as passive observers. Nor was the media presence reasonably necessary to the execution of the warrant. To the contrary:

> This was no ordinary search. It was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement.

Berger, 129 F.3d at 510.

It has been established since the early seventeenth century that "[e]ven a duly authorized officer could not execute a warrant to further the purposes of a private individual." *Buencore v. Harris*, 656 F.3d 347, 354 (4th Cir. 1995) (citing *Semayne's Case*, 77 Eng. Rep. at 198); *Burdett v. Abbot*, 104 Eng. Rep. 501, 560-61 (K. B. 1811)). This Court should not allow law enforcement officers to advance the private pecuniary interests of the media, and unnecessarily erode the delicate privacy and property rights of citizens, by allowing the media to accompany them in the execution of a warrant.

B. Media Involvement in the Execution of a Warrant Maximizes the Intrusion

Petitioners downplay the media intrusion in this case. They argue that the presence of CNN reporters at the Berger ranch was marginal and insignificant:

> [T]o the degree the Bergers allege a privacy interest which was invaded by the reporters' *presence* during the execution of the warrants, the incremental impact of having twenty-four people (including three journalists) instead of twenty-one (the FWS warrant execution team) witness the execution of the warrant . . . should not impact the constitutional balance. In other words, the incremental harm of having three civilians observing what twenty-one law enforcement officers already are viewing does not outweigh the significant public interests served by the presence of neutral journalists.

CNN brief at 38.

Putting aside CNN's undeserved claim of neutral journalism, this argument borders on the ludicrous. CNN's incremental impact was not merely three journalists, but the whole world. The video and audio tapes CNN recorded during the course of the search on the Bergers' private property were broadcast repeatedly to national and international audiences. The object of these broadcasts was to maximize dissemination of private information about the Bergers that was obtained by CNN only by use of the coercive power of government to compel the Bergers to grant CNN access. Moreover, these tapes were not allowed to speak for themselves. They were edited to imply more than they showed. The Bergers were portrayed by CNN as scofflaws who killed scores of protected eagles although Mr. Berger was never convicted of such a crime. Joint Appendix (App.) at 127. Consequently, the impairment to the Bergers' privacy could not have been greater.

But further insult was added to the Bergers' constitutional injury when the media broke state trespass law--with the collusion of law enforcement officers--by entering the Berger property without their consent or knowledge.

The Ninth Circuit held the media violated generally recognized principles of trespass law in the State of Montana when they accompanied federal agents in the execution of a warrant on the Berger property. *Berger*, 129 F.3d at 517. Contrary to the district court that had found there was no trespass because the government was "in control of the premises" when it searched the Berger ranch with the media, the Ninth Circuit ruled "such control does not authorize law enforcement officers to invite third parties on the premises for reasons unrelated to law enforcement." More specifically, the court held: "The warrant therefore does not justify the media intrusion here, because the officers invited the media for newsgathering, not for law enforcement." *Id.* at 516.

The parties agree that the media have no right to accompany the police in the execution of a warrant and can do so only when authorized by law enforcement officers. *See* CNN brief at 28. As amici ABC, *et al.*, point out, "media representatives are typically permitted to observe searches and seizures only at the sufferance of law enforcement officials." Amici ABC brief at 8. In this case, law enforcement officers not only granted permission for the media to trespass on private land, but conspired to hide the media's presence from the Bergers during the search.

It would be strange indeed if government officials were constitutionally authorized to conspire with the media, or any third party, to violate state law in the execution of a warrant. This type of government behavior simply cannot fall within the ambit of reasonable searches under the Fourth Amendment. Media involvement in the execution of a warrant without the informed consent of the property owner always magnifies the

intrusion. This is contrary to the goal of the Fourth Amendment to minimize impairment to the right of privacy.

II

THE PURPORTED ACCOMPLISHMENT OF SOME LAW ENFORCEMENT PURPOSE DOES NOT JUSTIFY THE EXPANDED INTRUSION OF THE NEWS MEDIA IN OBSERVING AND RECORDING THE EXECUTION OF A WARRANT

Petitioners would have this Court believe that the media always serve a legitimate law enforcement purpose. They suggest, for example, that media observation and recording of the execution of a warrant necessarily enables public oversight of law enforcement, deters crime, and curbs potential police misconduct. *See* CNN brief at 10. This is patently untrue. The media certainly did not serve these laudable functions in this case or in the *Wilson* and *Ayeni* cases. Rather, they served only their own mercenary interests.

It is hard to comprehend how CNN enabled oversight of law enforcement in this case when CNN was anything but a neutral observer. As the Ninth Circuit found, CNN was seeking entertaining footage for its environmental television show. To that end, CNN staged photo shoots and sought provocative soundbites. *See Berger*, 129 F.3d at 515. CNN even edited the audio and video tapes for television to imply the Bergers killed hundreds of eagles when the evidence did not back up those accusations. *See* Joint App. at 127.

The presence of CNN did not deter crime in this case but precipitated it. The federal officers who allowed CNN to accompany them to execute the warrant violated a federal statute prohibiting third party involvement except in aid of the search. *See* 18 U.S.C. § 1305. Also, CNN itself committed the crime of trespass when it entered the Bergers' private property and surreptitiously recorded the Bergers' conversations in their home without their consent.

Finally, the media did not deter police misconduct. Rather, the presence of the media induced police misconduct. For example, prior to the search, the media were illegally given information relative to the search and investigation that was under seal by the court. *See Berger*, 129 F.3d at 515. Moreover, the federal agents were more intent on playing to the cameras than on conducting a search. *Id.*

In *Wilson*, the companion case to *Berger*, two reporters accompanied the police as they entered the home of Mr. and Mrs. Wilson to execute an arrest warrant for their son. The subject of the warrant was not found in the home but news reporters took snapshots of Mr. Wilson as he was wrestled to the floor of his living room in his underwear with a police gun at his head. They also took pictures of Mrs. Wilson as she entered the living room from the bedroom dressed only in a shear nightgown. Although the Fourth Circuit proposed hypothetical reasons for the reporters' presence in the Wilson home, such as affording protection to the officers or facilitating accurate reporting, the dissent correctly remarks that these reasons are not "sufficiently necessary to the execution of an arrest warrant to justify the undermining of the sanctity of the home . . . ." *Wilson*, 141 F.3d at 132.

The unnecessary presence of a CBS camera crew in the *Ayeni* case particularly rankled the Second Circuit. The court was outraged at the boorish conduct of special agents when they intruded into a home looking for evidence of credit card fraud. When the woman of the house tried to cover her crying son's face with a magazine, a federal agent took the magazine out of her hand, threw it to the floor and told them to "shut up." He then directed the camera crew to film the woman's face while he questioned her. To these antics, the Second Circuit declared: "A private home is not a soundstage for law enforcement theatricals." The court further remarked:

> The unreasonableness of the [agent's] conduct in Fourth Amendment terms is heightened by the fact

> that, not only was it wholly lacking in justification based on the legitimate needs of law enforcement, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect--the right of privacy. The purpose of bringing the CBS camera crew into the Ayeni's home was to permit public broadcast of their private premises and thus magnify needlessly the impairment of their right to privacy.

Ayeni, 35 F.3d at 686.

As evidenced by these cases, the presence of the media is just as likely to generate police grandstanding and misconduct as it is to deter violence and crime. As a general proposition, it does not follow that the media necessarily perform a legitimate police purpose when they accompany law enforcement officers in the execution of a warrant. Even if they did, this would not suffice to justify law enforcement officers in allowing the media to accompany them and to observe and record their execution of a warrant, because the presence of the news media is not reasonably necessary to the execution of the warrant. Moreover, if the presence of the media were justified, because the media could accomplish some general law enforcement goal such as public oversight of law enforcement, the presence of the media could be justified in any police action or investigation, not just the execution of a warrant. However, the Framers apparently believed that public oversight of law enforcement was adequately addressed in the Sixth Amendment requirement of a public trial.

Nevertheless, petitioners argue that "government execution of a warrant is not a private event . . . ." CNN brief at 47. This is only half true. While neither the subject of the warrant nor law enforcement officers can preclude the news media from covering a story, they can exclude the media from private property. The right of a landowner to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). As noted above, the media transgressed the law of trespass when they entered the Berger property and invaded their home with a hidden microphone.

This right to exclude forms the very basis for Fourth Amendment privacy protection. This means the news media, like the rest of the general public, may stand on a public street or sidewalk and record the event from that vantage point, but they cannot invade private property without the owner's consent.

As Justice White pointed out in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information *not available to the public generally*." *Id.* at 684 (emphasis added).

In *Branzburg*, a newspaper reporter was held in contempt for refusing to divulge to a grand jury his personal knowledge of criminal acts that he had obtained in pursuit of a story. In addressing the right of the reporter to withhold such information, this Court reviewed certain purported press privileges and concluded, among other things:

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster *when the general public is excluded* . . . .

Branzburg v. Hayes, 408 U.S. at 684-85 (emphasis added).

By this reasoning, the media have no more right than the general public to observe and record the execution of a warrant. While "government execution of a warrant is not a private event," the warrant is not a license to turn a home into an open house, or, as the court noted in *Ayeni*, "[a] private home is not

a soundstage for law enforcement theatricals." *Ayeni*, 35 F.3d at 686.

CONCLUSION

The Fourth Amendment to the United States Constitution guarantees that the sanctity of the home and the fundamental right to privacy will not be abridged except by warrant or "exigent circumstances." CNN was not mentioned in the warrant nor was its presence reasonably necessary to execute the warrant. CNN accompanied federal agents only for its own commercial purposes. When law enforcement officers orchestrate the entry of third parties, including the media, onto private property without the consent of the owner, "without the authorization of a warrant, for no legitimate law enforcement need and justified by no exigent circumstances, they violate the clearly established protections of the Fourth Amendment." *Wilson*, 141 F.3d at 132.

DATED: January, 1999.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Pacific Legal Foundation

(8)

Supreme Court, U.S.
FILED
JAN 27 1999
CLERK

No. 97-1927

In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. McLEAN, RICHARD C. BRANZELL and ROBERT PRIEKSAT,

Petitioners,

vs.

PAUL W. BERGER and EMMA R. BERGER,

Respondents.

On Writ For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

KEVIN P. RODDY
Counsel of Record
MILBERG WEISS BERSHAD HYNES & LERACH LLP
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Counsel for Amicus Curiae, NASCAT

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37pp

BEST AVAILABLE COPY

QUESTION PRESENTED

Pursuant to this Court's Order dated November 9, 1998, the following questions are presented in this case:

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity?

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 1

ARGUMENT 2

I. THE COURT BELOW CORRECTLY HELD THAT LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM WHEN THEY EXECUTED THE WARRANT UPON RESPONDENTS' PROPERTY 2

A. The Ninth Circuit's Analysis And Conclusions 2

B. In Determining Whether The Fourth Amendment Has Been Violated, This Court Traditionally Examines What Protections Against Unreasonable Searches And Seizures Were Afforded By The Common Law At The Time Of Framing The Constitution 6

C. The Fourth Amendment Was Adopted By The Framers To Prohibit Abuses Of Official Power Epitomized By General Warrants And Writs Of Assistance 10

D. Given The Historical Foundations Of The Fourth Amendment, The Court Below Correctly Found That Petitioners' Conduct Constituted An Unreasonable Search And Seizure 26

II. THE COURT BELOW PROPERLY FOUND THAT PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY FOR THEIR ACTIONS 28

III. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 28

Anderson v. WROC-TV, 441 N.Y.S.2d 220 (Sup. Ct. 1981) 4, 5, 26

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994) ... 4, 27, 29, 30

Bell v. Clapp, 10 Johns. 263, 6 Am. Dec. 339 (Sup. Ct. 1813) 25

Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998) 2

Boyd v. United States, 116 U.S. 616 (1886) 18, 19, 23, 24

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) .. *passim*

California v. Acevedo, 500 U.S. 565 (1991) 25

California v. Hodari D., 499 U.S. 621 (1991) 8

Carroll v. United States, 267 U.S. 132 (1925) 8

Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765) 23

Frank v. Maryland, 359 U.S. 360 (1959) 11

Hagler v. Philadelphia Newspapers, C.A. No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. July 10, 1996) 29

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 28

Hulit v. State, No. 877-97, 1998 Tex. Crim. App. LEXIS 174 (Tex. Crim. App. Dec. 16, 1998) 13

Jenkins v. Chief Justice, 619 N.E.2d 324 (Mass. 1993) 11, 17, 20

Lo-Ji Sales v. New York, 442 U.S. 319 (1979) 11

TABLE OF AUTHORITIES – Continued

Page

Marshall v. Barlow's Inc., 436 U.S. 307 (1978) 11

Moran v. State, 644 N.E.2d 536 (Ind. 1994) 25

New Jersey v. T.L.O., 469 U.S. 325 (1985) 8

Payton v. New York, 445 U.S. 573 (1980) 9

People v. Milone, 195 N.Y.S. 488 (Sup. Ct. 1922) 25

Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603) 15, 16, 26

Spangler v. Booze, 49 S.E. 42 (Va. 1904) 25

Stanford v. Texas, 379 U.S. 476 (1965) ..... *passim*

State v. Attaway, 870 P.2d 103 (N.M. 1994) 25

State v. Kinney, 698 N.E.2d 49 (Ohio 1998) ..... *passim*

Steagald v. United States, 451 U.S. 204 (1981) .. 11, 12, 18

United States v. Beckford, 962 F. Supp. 767 (E.D. Va. 1997) 25

United States v. Chadwick, 433 U.S. 1 (1977) 12

United States v. Maresca, 266 F. 713 (S.D.N.Y. 1920) 25

United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1992) 24

United States v. Watson, 423 U.S. 411 (1976) 8

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 10

Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (C.P. 1763) 14, 22, 23

Wilson v. Arkansas, 514 U.S. 927 (1995) 8, 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND REGULATIONS

United States Constitution Amendment IV ..... *passim*

18 U.S.C.

§ 3105 ..... 24, 25

New York Code Criminal Procedure

§ 798 25

SUPREME COURT RULES

Rule 37.1 1

Rule 37.3(a) 1

Rule 37.6 1

SECONDARY AUTHORITIES

Akhil Reed Amar, *The Constitution and Criminal Procedure* (1997) 13

Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 20 Suffolk U.L. Rev. 53 (1996) 18

Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707 (1996) ..... *passim*

Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 Stan. L. Rev. 555 (1996) 9

William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment in the United States Constitution*, 37 Wm. & Mary Q. 371 (1980) 16

O.M. Dickerson, "Writs of Assistance as a Cause of the Revolution," in *The Era of the American Revolution* 40 (Richard B. Morris, ed. 1939) 18

II Sir Matthew Hale, *The History of the Pleas of the Crown* 150 (First American Edition, 1847, of original English publication in 1736) 25

Richard E. Hillary, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule*, 27 U. Tol. L. Rev. 473 (1996) 21

Jacob W. Landynski, *Search and Seizure and the Supreme Court* (1966) 9

Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937) 13, 14, 17

2 *Legal Papers of John Adams* (L. Wroth & H. Zobel eds. 1965) 17, 20

Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197 (1993) 11

Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. Rev. 925 (1997) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1 (1994) 10

Bruce H. Mann, *The Writs of Assistance Case*, 11 Conn. L. Rev. 353 (1979) 18

Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772* (Little, Brown 1865) 18

Darren K. Sharp, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 Drake L. Rev. 149 (1997) 12

M.H. Smith, *The Writs of Assistance Case* (1978) ... 18, 19

Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365 (1983) 11, 12, 21

Telford Taylor, *Two Studies in Constitutional Interpretation* (1969) 13, 18, 20

Charles H. Whitebread & Christopher Sloboggin, *Criminal Procedure* 130 (3d ed. 1993) 13

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS (NASCAT) IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

The National Association of Securities and Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who primarily represent plaintiffs in civil actions brought in federal and state courts. NASCAT's members litigate cases seeking to recover damages on behalf of victims of violations of antitrust, civil rights, commercial, consumer, employee and retiree benefit, environmental, insurance and securities laws, as well as violations of federal and state constitutions. Thus, NASCAT's members represent victims of corporate and government abuse, schemes to defraud, defective products and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve victims' access to justice.

NASCAT files this *amicus curiae* brief in support of Respondents and argues herein that the decision of the court below should be affirmed. Pursuant to Supreme Court Rule 37.1, NASCAT respectfully submits that this *amicus curiae* brief will bring to this Court's attention relevant matter and arguments concerning the purpose

---

[1] Pursuant to Supreme Court Rule 37.3(a), letters of consent to the filing of this *amicus curiae* brief received from Petitioners' and Respondents' counsel have been filed with this Court. In accordance with Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

and meaning of the Fourth Amendment by explicating the historical context of unreasonable searches and seizures known to the Framers of the Constitution. Our review of the briefs filed in this Court by Petitioners and their *amici* indicates that they have not addressed this critical issue, which this Court has repeatedly recognized must be carefully analyzed in Fourth Amendment cases.[2]

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM WHEN THEY EXECUTED THE WARRANT UPON RESPONDENTS' PROPERTY.

A. The Ninth Circuit's Analysis And Conclusions[3]

In the court below, Respondents claimed that Petitioners Kris A. McLean (an Assistant U.S. Attorney) and Rodney C. Hanlon, Joel Scrafford, Richard C. Branzwell and Robert Prieksat (special agents of the U.S. Fish and Wildlife Service) are individually liable for damages caused by their active participation in what the Ninth

---

[2] Page references to the briefs filed in this Court by Petitioners and their *amici* are stated herein as "Pet. Brief. at ___" (Brief for Petitioners), "Cable News Brief at ___" (Brief of Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann in Support of Petitioners), and "ABC Brief at ___" (Brief of *Amicus Curiae* ABC, Inc. et al. in Support of Petitioners).

[3] The opinion of the Ninth Circuit Court of Appeals in this case is reported as *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), and is reproduced in the Petition for Writ of Certiorari ("Pet. App.") at pages 1a-26a.

Circuit termed the "commercial television/law enforcement enterprise" conducted at Respondents' ranch. Pet. App. 9a [129 F.3d at 510]. Respondents contended that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. The court below held that Respondents are correct and that the federal officers are not entitled to qualified immunity. Pet. App. 9a-13a [129 F.3d at 510-12].

In reaching those conclusions, the court below noted that "[t]his was no ordinary search." Pet. App. 9a [129 F.3d at 510]. Rather,

> [i]t was *jointly planned by law enforcement officials and the media*, as memorialized by a written contract, *so that the officials could assist in the media obtaining material for their commercial programming*. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. *This search stands out as one that at all times was intended to serve a major purpose other than law enforcement.* Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media's purpose.

Pet. App. 9a-10a [129 F.3d at 510-11] (emphasis added). After quoting the Fourth Amendment and explaining that it "protects against unreasonable searches and warrants that are obtained under false pretenses," Pet. App. 10a [129 F.3d at 511], the Ninth Circuit emphasized that "[w]e must heed its strictures on the potential abuse of law enforcement powers." *Id.*

The court below found support for its conclusions by surveying reported cases from the Second Circuit (*Ayeni*) and the Fourth Circuit (*Buonocore*) reaching the same

conclusion,[4] and distinguishing cases from the Fourth, Sixth and Eighth Circuits cited by Petitioners. Pet. App. 10a-13a [129 F.3d at 511-12]. What the Ninth Circuit correctly found most significant, however, was the Fourth Circuit's statement in *Buonocore* that while it agreed with the Second Circuit's decision in *Ayeni*, "[w]e would so hold even if there were no reported authority directly on point," *Buonocore*, 65 F.3d at 356, because

> *the historical foundations of the Fourth Amendment . . . so plainly show[ ] that "[t]he right to be free from government officials facilitating a private person's general search" was " 'manifestly included' within the 'core' Fourth Amendment protection."*

Pet. App. 11a [129 F.3d at 511] (emphasis added) (quoting *Buonocore*, 65 F.3d at 357).

The court below also cited and quoted from the decision of the Supreme Court of New York in *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981), which stated in a case in which the media was sued for trespass:

> *If the news media were to succeed in compelling an uninvited and nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists.* William Pitt, later Lord Chatham, found this unchecked intrusion so offensive to a free people that he denounced it

[4] *See, e.g., Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that qualified immunity does not protect federal officers where a Secret Service agent invited a TV news magazine into a private home to videotape a search); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (where a federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity).

> in words which again bear repetition: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter! – all his force dares not cross the threshold of the ruined tenement!"
>
> There is no consent that I am aware of, whether created by law or by custom, which permits television cameras to enter where the sovereign may not.

441 N.Y.S. 2d at 226 (emphasis added). *See* Pet. App. 11a [129 F.3d at 511].

As set forth below, in assessing whether Petitioners' conduct violated Respondents' Fourth Amendment rights, and in determining whether Petitioners are entitled to qualified immunity in this case, this Court should – as it has traditionally done in search-and-seizure cases – examine the historical foundations of the Fourth Amendment, including the American colonists' struggle against the abuses occasioned by British Crown officers' use of general warrants and writs of assistance, and conclude that Respondents' right to be free from Petitioners' facilitating the news media's general search of their home was manifestly included within the "core" protections afforded by the Fourth Amendment. Accordingly, the decision of the court below should be affirmed.

B. In Determining Whether The Fourth Amendment Has Been Violated, This Court Traditionally Examines What Protections Against Unreasonable Searches And Seizures Were Afforded By The Common Law At The Time Of Framing The Constitution

Notwithstanding the undeniable emphasis correctly placed by the court below on the "historical foundations of the Fourth Amendment," Pet. App. 11a [129 F.3d at 511], one searches Petitioners' Brief in vain for *any* analysis of the Fourth Amendment's meaning or its historical foundations and context. *See* Pet. Brief at 10-48. (The same is true of the briefs submitted to this Court by Petitioners' *amici*. *See* Cable News Brief at 10-47; ABC Brief at 3-10.) NASCAT suggests that Petitioners' oversight of this seminal point is significant because in Fourth Amendment cases, this Court has traditionally analyzed what protections against unreasonable searches and seizures were afforded at the common law at the time of the framing of the Constitution.

As in the court below, *see* Pet. App. 10a, this Court's analysis begins with the Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Although the text of the amendment contains simple language,[5] courts and commentators agree that diverse events in the history of Great Britain and the United States produced that language and that what the court below termed the "historical foundations of the Fourth Amendment," Pet. App. 11a, must be analyzed and carefully heeded in evaluating the meaning and scope of the personal rights sought to be protected by the Fourth Amendment.[6]

As a result, in Fourth Amendment cases, this Court most often "look[s] to the traditional protections against

---

[5] After quoting the Fourth Amendment in *Buonocore*, 65 F.3d at 353, the Fourth Circuit explained its provisions in the following passage:

> These few words contain two related concepts of particular importance here. First, by mandating that "no warrants shall issue" unless they "particularly" describe "the place to be searched" and "things to be seized," *the Framers prohibited the use of general warrants issuable to anyone*. Second, by expressly acknowledging the substantive "right of the people to be secure in their . . . houses," *the Framers recognized a person's special right to privacy, to be left undisturbed – except for reasonable searches – within his own home.*

Id. (emphasis added).

[6] Professor Maclin states that the text of the Fourth Amendment "did not emerge in a vacuum"; rather, "[s]everal centuries of British and American legal theory and practice gave shape and meaning to the Fourth Amendment." Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U.L. Rev. 925, 938 (1997) ("Maclin, *Historical Review*") (citing Morgan Cloud, *Searching Through History; Searching For History*, 63 U. Chi. L. Rev. 1707, 1724 (1996) ("Cloud, *Searching Through History*") ("The text [of the Fourth Amendment] articulated ideas that had percolated through Anglo-American law for centuries.")).

unreasonable searches and seizures afforded by the common law at the time of the framing" of the Constitution. *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (citing *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *United States v. Watson*, 423 U.S. 411, 418-20 (1976); and *Carroll v. United States*, 267 U.S. 132, 149 (1925)).[7]

Thus, *Carroll* explained that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable," 267 U.S. at 147, and, in holding that a warrantless car search was unreasonable unless supported by some level of individualized suspicion, this Court based its conclusion on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted." *Id.* at 149.

Similarly, in *Wilson*, a recent unanimous opinion ignored by Petitioners (*see* note 7, *supra*), this Court conducted a lengthy examination of the common law of search and seizure to determine whether the reasonableness of a search of a dwelling depended on whether law enforcement officers announced their presence prior to entering. 514 U.S. at 931-34. After discussing English common law, learned commentary thereon, and the codification of English common law into the fabric of early

---

[7] As Justice Thomas explained in *Wilson*:

> "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable," our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the [Fourth] Amendment.

514 U.S. at 931 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)). Petitioners ignore *Wilson* entirely; their *amici* cite it but ignore this Court's analysis of the Framers' intent and meaning underlying the Fourth Amendment. *See* Cable News Brief at 22; ABC Brief at 7.

American statutory and case law, *id.*, Justice Thomas concluded for this Court that "[g]iven the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure." *Id.* at 934. *See also Payton v. New York*, 445 U.S. 573, 591-98 (1980) (finding no direct common law authority permitting forcible entry of the home to effectuate a warrantless arrest).

Thus, in the words of Professor Maclin, "to understand what the Fourth Amendment means today, one has to understand the meaning history impressed upon the Amendment in 1791." Maclin, *Historical Review*, 77 B.U.L. Rev. at 926.[8] As detailed below, the liberty secured by the Fourth Amendment – the right to be free from unreasonable search and seizure – "is a 'made in America' freedom, having its origins in the American colonists' battle against heavy-handed British law enforcement methods." *Id.* (citing Jacob W. Landynski, *Search and Seizure and the Supreme Court* 19 (1966) (" '[T]he Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew

---

[8] *See also* Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property and Liberty in Constitutional Theory*, 48 Stan. L. Rev. 555, 625 (1996) ("When the background purposes and underlying values for a portion of the Constitution can be discerned, these purposes and values should drive the interpretation of the text."); *Buonocore*, 65 F.3d at 353 ("Examination of the common law leading up to ratification of the Fourth Amendment reveals what is implicated in these concepts, as well as the deliberateness and significance of the choice to adopt them.").

directly out of the events which immediately preceded the revolutionary struggle with England.' ")).

C. The Fourth Amendment Was Adopted By The Framers To Prohibit Abuses Of Official Power Epitomized By General Warrants And Writs Of Assistance

Justices O'Connor, Stevens and Souter recently stated that what the Framers of the Fourth Amendment "most strongly opposed" were "general searches – that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, Stevens & Souter, JJ., dissenting) (citing, *inter alia*, William John Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1402, 1499, 1555 (1990) (Ph.D. Dissertation at Claremont Graduate School) ("Cuddihy, *Original Meaning*")).[9]

The account of how the protections of the home from intrusion, first established in English law, were expanded

---

[9] In *Vernonia Sch. Dist.*, Justices O'Connor, Stevens and Souter cited Cuddihy's two-volume dissertation 13 times in four pages, 515 U.S. at 669-72, referring to it as "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Id.* at 669. Numerous academic commentators have agreed with that description. *See* Maclin, *Historical Review*, 77 B.U.L. Rev. at 928 ("Cuddihy's work is the most comprehensive and insightful study of the Fourth Amendment's history every written."); Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1712-13 (same; "The work is exhaustive; it is monumental. It is likely to become essential reading for students of the Fourth Amendment."); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1, 5 n.21 (1994) ("Maclin, *Fourth Amendment*") (same).

and given new force in America because of abuses of Crown officers in the colonies has previously been told by this Court, as well as by other courts. *See Steagald v. United States*, 451 U.S. 204, 220 (1981); *Lo-Ji Sales v. New York*, 442 U.S. 319, 325 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978); *Stanford v. Texas*, 379 U.S. 476, 482-86 (1965); *Frank v. Maryland*, 359 U.S. 360, 362-65 (1959); *see also Buonocore*, 65 F.3d at 353-56; *State v. Kinney*, 698 N.E.2d 49, 51-52 (Ohio 1998).[10] These cases recognize that the Fourth Amendment was adopted to "prohibit the abuse of official power brought about by two devices which the British Crown used in the colonies: the general warrants and the writs of assistance." *Jenkins v. Chief Justice*, 619 N.E.2d 324, 330 (Mass. 1993) (citing Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1368-71 (1983) ("Stewart, *Origins*") (reviewing the historical roots of the Fourth Amendment and of cognate provisions of certain state constitutions)). In *Steagald*, 451 U.S. at 220, this Court emphasized that "[t]he Fourth Amendment was intended partly to protect against the abuses of the

---

[10] *See also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 218 (1993) ("The Court often explains that our constitutional attitudes toward governmental search and seizure power derive from the abuses generated by writs of assistance and general warrants used by British customs officials against colonial merchants and businessmen.") (citing, *inter alia*, *Marshall*, 436 U.S. at 311-12).

general warrants that had occurred in England and of the writs of assistance used in the Colonies."[11]

General warrants, which empowered their holder to seize and burn books or other printed matter deemed "offensive to the state," Stewart, *Origins*, 83 Colum. L. Rev. at 1369, " 'were the standard colonial method of search, seizure, and arrest' " by 1760. Maclin, *Historical Review*, 77 B.U.L. Rev. at 940 (quoting 1 Cuddihy, *Original Meaning*, at 460). Historically, a general warrant was primarily used to search and seize any printing press or papers critical of the King or the Parliament. These warrants failed to specify *who* or *what* was to be searched or seized, allowing government officials to arrest any persons or search anything desired if it possibly related to criticism of the King. *See Steagald*, 451 U.S. at 220.[12] Historical research indicates that the Framers' primary, if not

[11] *See also United States v. Chadwick*, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly used in England."); *Stanford*, 379 U.S. at 481-85 (same). In the recent words of the Supreme Court of Ohio:

> Constitutional jurisprudence has long recognized that the Fourth Amendment was drafted, in part, to bar the use of general warrants under federal power. The Constitution's framers, from experience with the use of general warrants by colonial authorities and from the long history of their use in England, viewed the devices as inimical to the principles of liberty.

Kinney, 698 N.E.2d at 51 (citing Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1724-28).

[12] *See also* Darren K. Sharp, *Drug Testing and the Fourth Amendment: What Happened to Individualized Suspicion?*, 46 Drake L. Rev. 149, 152-53 (1997). The Fourth Circuit has stated that general warrants "directed at anyone were common in Great Britain up until the 1700s." *Buonocore*, 65 F.3d at 353-54 (citing

sole, concern in drafting the Fourth Amendment was avoiding a repetition of the British colonial practice of issuing general warrants or warrants based upon bare suspicion.[13] Such warrants were doubly pernicious because they not only authorized intrusions on the privacy of the colonists, they effectively prevented civil redress by shielding the executing officers from civil liability. *See* Maclin, *Historical Review*, 77 B.U.L. Rev. at 932-36 (enumerating statutory and other impediments to suing a British searcher for damages).[14]

Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 24-42 (1937) ("Lasson, *History and Development*")).

[13] *See* Charles H. Whitebread & Christopher Sloboggin, *Criminal Procedure* 130 (3d ed. 1993); Telford Taylor, *Two Studies in Constitutional Interpretation* 41 (1969) ("Taylor, *Constitutional Interpretation*").

[14] *See also* Akhil Reed Amar, *The Constitution and Criminal Procedure* 13-16 (1997); *Hulit v. State*, No. 877-97, 1998 Tex. Crim. App. LEXIS 174, at *15 (Tex. Crim. App. Dec. 16, 1998).

At common law, tort suits framed as trespass or false imprisonment cases formed the primary means of penalizing and deterring unreasonable searches and seizures; however, plaintiffs bringing such actions "encountered numerous procedural obstacles that prevented these suits from becoming an effective deterrent to unreasonable intrusions." Maclin, *Historical Review*, 77 B.U.L. Rev. at 932. Cuddihy writes:

> Trespass was quite effective when a forcible search and seizure had occurred without affecting the public interest, but nearly all kinds of general warrants and searches did affect that interest. False imprisonment was actionable towards those who had instigated it but not towards the officials who enforced it, and the plaintiff had to prove that malice had motivated his arrest or imprisonment. The promiscuity of a search, arrest, or seizure constituted neither false imprison-

The Fourth Amendment not only reflected the American colonists' struggle against these oppressive devices, but also was the product of a centuries-long legal struggle in England against the use of general warrants.[15] One

---

ment nor trespass, nor was it even an aggravation of either.

2 Cuddihy, *Original Meaning*, at 1219-20 (footnotes omitted). Under British law, legislation penalized an unsuccessful suit against an officer or informer by fining his antagonist double or even treble the damages sought. *Id.* at 873. Another means of shielding officers from liability was to permit them to request a retroactive finding of probable cause for a seizure. *Id.* at 876.

Many of these obstacles to successful tort suits were imported from England to the American colonies. Thus, legislation enacted in Virginia, Georgia and the Carolinas discouraged lawsuits against customs collectors, regardless of whether they had acted pursuant to a warrant, by requiring unsuccessful plaintiffs to forfeit twice the amount for which they sued. 1 Cuddihy, *Original Meaning*, at 425-29; Maclin, *Historical Review*, 77 B.U.L. Rev. at 935. Indeed, the same Congress that proposed the Fourth Amendment passed the Collection Act of 1789, which granted American officers many of the same immunities enjoyed by their British counterparts. 2 Cuddihy, *Original Meaning*, at 1542.

[15] The English Common Pleas Court's judgment in *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (C.P. 1763), provides one often-cited precedent for the Fourth Amendment's bar against general warrants. *See Stanford*, 379 U.S. at 483. The warrant at issue in that case authorized the King's officers to search for unknown individuals responsible for publishing a " 'seditious and treasonable paper, entitled, The North Briton, No. 45,' " to apprehend them and seize them and their papers. *Id.* (quoting Lasson, *History and Development*, at 43). Because the warrant named neither the individuals suspected nor a particular location where they could be found, the warrant, in effect, subjected the entire nation to possible search. The *Wilkes* court held that the warrant was illegal and awarded damages to Wilkes against Lord Hallifax, the Secretary of State who had

of the most cited reasons for opposition to general warrants was the recognition of a person's right to privacy within his own home. In *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603), the court held that not even authorized specific warrants could be executed without giving the homeowner notice (*i.e.*, without knocking before entering). Lord Coke explained that the sheriff, who was properly acting on behalf of the King, could not execute a specific warrant without notice to the homeowner because "the house of every one is to him as his . . . castle." 5 Co. Rep. at 91b, 77 Eng. Rep. at 198. Thus, even when executing a specific warrant for the King, the sheriff was required to first "signify the cause of his coming, and . . . make request to open doors." *Id.*

Moreover, in *Semayne's Case* the English court also held that it was unlawful for a sheriff to execute a warrant against the homeowner's wishes – even after

---

issued the warrant. *See Kinney*, 698 N.E.2d at 52; *see also* 2 Cuddihy, *Original Meaning*, at 1221 (noting that *Wilkes* made it possible to sue not only the instigator of an unreasonable search and seizure, but also the person sent to carry it out).

Although *Wilkes* and its progeny provided significant reform, their impact should not be overstated. Professor Maclin writes:

> The rulings in those cases were directed specifically toward general warrants issued by the Secretary of State for seditious libel – "[t]he judicial assault on general warrants was selective, not categorical, for it reached only an atypical genre of those warrants." Despite these changes, other legal obstacles helped shield officers from liability: penalizing unsuccessful plaintiffs; petitioning judges to find retrospective probable cause; and pleading the general issue.

Maclin, *Historical Review*, 77 B.U.L. Rev. at 933-34 (footnotes omitted) (quoting 2 Cuddihy, *Original Meaning*, at 923-24).

knocking and announcing his presence – when the sheriff was acting "at the suit" of a private citizen, rather on behalf of the King. 5 Co. Rep. at 92b, 77 Eng. Rep. at 198 ("it is not lawful for the Sher[iff] (on request made and denial) at the suit of a . . . common person, to break the defendant's house . . . to execute any process at the suit of any subject"). Thus, in the recent words of the Fourth Circuit:

> [A]s early as 1603, it was established in the common law that intrinsic to the validity of the specific warrant was that it had to be executed by a properly commissioned officer to further the *government's purposes*. Even a duly authorized officer could not execute a warrant to further the purposes of a private individual. *See also Burdett v. Abbott*, 14 East 2, 156-57 (K.B. 1811).

Buonocore, 65 F.3d at 354.[16] The British court's analysis and holding in *Semayne's Case* are significant because in this case the Ninth Circuit specifically found that Petitioners' search of Respondents' home was planned to serve the purposes of the news media. Pet. App. 9a-10a [129 F.3d at 510-11].

More than a century after the common law was established in *Semayne's Case*, in exerting control over the colonies Great Britain enacted various general *writs of assistance*. "One of the chief grievances of the American colonists against England was the use of 'writs of assistance' by the King's customs officers." *Kinney*, 698 N.E.2d

---

[16] *See also* William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment in the United States Constitution*, 37 Wm. & Mary Q. 371, 371-72 (1980) (explaining the Fourth Amendment, adopted in response to English and colonial violations of the privacy of the home, as an expression of the idea that "a man's house is his castle").

at 51. The writ, "although not a search warrant in the traditional sense because it did not authorize a search, was a court order to constables, peace officers, and subjects of the Crown to assist customs officers in the execution of their duties." Maclin, *Fourth Amendment*, 68 S. Cal. L. Rev. at 8.[17] Writs of assistance were a special kind of general warrant which permitted their bearer, usually a customs official, "to search with unlimited discretion for smuggled goods without special application to a court." *Jenkins*, 619 N.E.2d at 330 (citing 2 *Legal Papers of John Adams* 108 (L. Wroth & H. Zobel eds. 1965), and Stewart, *Origins*, 83 Colum. L. Rev. at 1370).[18] "The crux of the colonists' objection to these legal devices was the unchecked control over the liberty of the people which they vested in law enforcement officers." *Jenkins*, 619

---

[17] Writs of assistance were used by British customs officials to facilitate enforcement of the trade laws in the American colonies. *See Kinney*, 698 N.E.2d at 51 ("Writs of assistance gave customs officials unbounded authority to seek out violations of the despised colonial tax laws."). "The writ empowered the officer and his deputies and servants to search, at their will, wherever they suspected uncustomed goods to be, and to break open any receptacle or package falling under their suspecting eye." Lasson, *History and Development*, at 54 (footnote omitted).

[18] According to the Supreme Judicial Court of Massachusetts:

> In England, the term "writ of assistance" originally referred to the process whereby a litigant in the Court of Exchequer or in Chancery would obtain the assistance of the sheriff in collecting a debt or gaining possession of property. *See* 2 *Legal Papers of John Adams* 107 (L. Wroth & H. Zobel eds. 1965).

Jenkins, 619 N.E.2d at 330 n.17. "[O]nce issued, writs of assistance were valid until six months after the death of the current monarch." *Buonocore*, 65 F.3d at 354 n.5 (citing *Jenkins*, 619 N.E.2d at 330 n.18).

N.E.2d at 330; *see also Steagald*, 451 U.S. at 220; *Stanford*, 379 U.S. at 481-85; Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 20 Suffolk U. L. Rev. 53, 77-78 (1996). In the words of the Fourth Circuit, abuses associated with the use of writs of assistance were greatest among "the colonists' particular grievances against the mother country." *Buonocore*, 65 F.3d at 354; *see also Stanford*, 379 U.S. at 481 ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists.").

In *Boyd v. United States*, 116 U.S. 616 (1886), this Court described at length the colonists' outrage at the writs of assistance.[19] In the famed *Paxton's Case*, argued in the Massachusetts Superior Court in February 1761,[20] James Otis presented a theory of American jurisprudence which embodied the colonists' position and formed the basis of

[19] As noted above, courts and historians have described resistance to the writs of assistance as a major cause of the American Revolution. *See Stanford*, 379 U.S. at 481-82; *Kinney*, 698 N.E.2d at 51-52; Maclin, *Historical Review*, 77 B.U.L. Rev. at 945; Taylor, *Constitutional Interpretation*, at 38; O.M. Dickerson, "Writs of Assistance as a Cause of the Revolution," in *The Era of the American Revolution* 40 (Richard B. Morris, ed. 1939).

[20] The complete citation is *Paxton's Case on the Writ of Assistance*, as reported in Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772* 51-57 (Little, Brown 1865). *See* Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1715 n.29. The background and aftermath of the case is reviewed in M.H. Smith, *The Writs of Assistance Case* (1978) ("Smith, *Writs of Assistance*"), which has been described as "a truly exhaustive study" of the English and colonial American history dealing with writs of assistance. Bruce H. Mann, *The Writs of Assistance Case*, 11 Conn. L. Rev. 353, 355 (1979); *see also* Maclin, *Fourth Amendment*, 68 S. Cal. L. Rev. at 14 n.53.

the Fourth Amendment.[21] As this Court described the significant historical context and quoted from Otis's famous attack on these writs:

> The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer."

Boyd, 116 U.S. at 625. Observing that "the famous debate" in which Otis's argument had been advanced "was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country," *id.*, this Court quoted John Adams as stating: " 'Then and there . . . was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.' " *Id.*; *see*

[21] In *Paxton's Case*, Otis was counsel for a group of Boston merchants who were opposed to the writs of assistance. Because writs of assistance remained in force only until the death of the reigning monarch, when George II died on October 25, 1760, customs agents were obliged to apply to the Superior Court for new writs. *Paxton's Case* began when the merchants petitioned the Superior Court to deny the writs. *See* Maclin, *Historical Review*, 77 B.U.L. Rev. at 946; 1 Cuddihy, *Original Meaning*, at 757-64; Smith, *Writs of Assistance*, at 312-86.

also Stanford, 379 U.S. at 481-82; *Kinney*, 698 N.E.2d at 51-52.[22]

James Otis, like Lord Coke before him, remonstrated against general warrants, *inter alia*, because they were not directed solely at authorized officers acting on behalf of the government *but could be executed at the request of anyone*. Moreover, Otis argued that such warrants constituted an improper invasion of a person's cherished right to privacy, particularly in his own home. *See Buonocore*, 65 F.3d at 355; *Jenkins*, 619 N.E.2d at 330-31. Although Otis's position was rejected by the Superior Court, which unanimously decided to issue new writs, *see* Maclin, *Historical*

---

[22] Professor Maclin provides additional historical context for this significant event in American jurisprudence and the full text of John Adams' report:

> John Adams was a young lawyer when Otis delivered his argument in the writs of assistance case. Adams later wrote that:
>
> > "Otis was a flame of fire! . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely, in 1776, he grew up to manhood, and declared himself free."

Maclin, *Historical Review*, 77 B.U.L. Rev. at 970 (quoting Letter from John Adams to William Tudor (Mar. 29, 1817)). Otis's famous attack on writs of assistance in *Paxton's Case*, derived from 2 *Legal Papers of John Adams* 134-44, is quoted at length by the Fourth Circuit in *Buonocore*, 65 F.3d at 355; *see also Jenkins*, 619 N.E.2d at 330-31. Telford Taylor writes that "[t]he writs of assistance were anathema in the colonies, and [James] Otis' argument against them was well known among the founding fathers." Taylor, *Constitutional Interpretation*, at 38.

Review, 77 B.U.L. Rev. at 947, in the ensuing years his argument was accepted by the Supreme Courts of Pennsylvania and Virginia, and by the First Congress when in 1789 it adopted the Fourth Amendment.[23] In *Buonocore*, the Fourth Circuit emphasized the significance of Otis' argument against general warrants:

> Thus, when the Framers recognized the "right of the people to be secure in their . . . houses" from "unreasonable searches" and mandated that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the things to be seized," *they rejected general warrants with all the pitfalls outlined by Otis – and*

---

[23] *See* Richard E. Hillary, *Arizona v. Evans and the Good Faith Exception to the Exclusionary Rule: The Exception is Swallowing the Rule*, 27 U. Tol. L. Rev. 473, 475-76 (1996); Maclin, *Fourth Amendment*, 35 Wm. & Mary L. Rev. at 225-26. Justice Stewart has written:

> Otis lost his case, but his side was to win the war. Throughout the colonies, opposition to the writs mounted in the wake of Otis's words, and courts proved increasingly reluctant to issue them.

Stewart, *Origins*, 83 Colum. L. Rev. at 1370-71 (footnote omitted). At the Virginia ratifying convention in 1788, Patrick Henry complained that general warrants " 'exposed any person or property to seizure " 'in the most arbitrary manner, without any evidence or reason. Everything the most sacred may be searched and ransacked by the strong arm of arbitrary power.' " ' " Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1727 n.63 (quoting 2 Cuddihy, *Original Meaning*, at 1387).

> *Lord Coke – including issuance of a warrant at the suit of a private citizen.*

65 F.3d at 355 (emphasis added).[24]

The historical record of the years immediately preceding drafting and ratification of the Fourth Amendment supports the unassailable conclusion that a consensus among colonists began to emerge rejecting broad categories of searches and seizures as unreasonable, including general searches that were conducted with or without warrants. *See* Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1724. The American colonists were not alone in their hatred of such abuses; indeed, a decade before the first shots were fired at Lexington and Concord, Massachusetts, the English courts already deemed general warrants unlawful. As noted above, in *Wilkes v. Wood*, an action for false imprisonment, Chief

---

[24] Professor Maclin concurs:

> By the time Congress proposed the Fourth Amendment for ratification, Americans had experienced unreasonable search and seizure from many quarters. *Their desire to protect the privacy and security of their homes from promiscuous intrusion led the Framers to create a right to be free from unreasonable search and seizure. Viewing the general warrant and its close cousin, the writ of assistance, as law enforcement instruments that substantially undermined their privacy and security, Americans strongly resented them.* The origins and history of the Fourth Amendment reveal that in devising alternative methods of enforcement, legislatures and judges alike considered the specific warrant to be the best available tool to protect privacy and check the discretionary powers of officers.

Maclin, *Historical Review*, 77 B.U.L. Rev. at 954-55 (emphasis added; footnote omitted); *see also* Cloud, *Searching Through History*, 63 U. Chi. L. Rev. at 1724, 1730.

Justice Pratt declared general warrants as "a power capable of affecting every person in the kingdom, and is totally subversive to the liberty of the subject." 98 Eng. Rep. at 498. Subsequently, in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (C.P. 1765), an action for trespass for entering the plaintiff's house and breaking open his desks and boxes and searching through his papers in pursuit of a case for seditious libel, Lord Camden condemned the issuance of general warrants as dangerous and unconstitutional and likened them to the Spanish Inquisition. 95 Eng. Rep. at 812. In addition, Lord Camden asserted that the protection of privacy and property was the chief purpose of the law and declared that a general warrant to search a person's home and seize his papers was illegal and void. *Id.* at 818. One hundred years later, this Court characterized *Entick* as "one of the permanent monuments of the British constitution," emphasizing that the case's preeminence at the time of the Constitution's adoption rendered it persuasive on the question of the intent of the Framers of the Fourth Amendment. *Boyd*, 116 U.S. at 626-27; *see also Stanford*, 379 U.S. at 483 (discussing English court decisions in *Wilkes* and *Entick*).

Based upon the development of the law of search and seizure in England and the experience in the American colonies, the Framers gave new protection against intrusions into the home by adopting the Bill of Rights. A century later, in *Boyd*, this Court explained the significance of the Fourth Amendment in addressing whether a district court order requiring claimants to produce invoices in a forfeiture action connected to the fraudulent avoidance of importation duties comported with the Fourth and Fifth Amendments. Moving away from the English courts' conception of prohibitions against search

and seizure as based strictly upon property rights, this Court stated:

> [The Fourth Amendment applies] to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense, – it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in *Entick*].

Boyd, 116 U.S. at 630.

In *United States v. Sanusi*, 813 F. Supp. 149 (E.D.N.Y. 1992), a criminal defendant sought production of videotapes prepared by CBS News employees during a lawful search of his apartment by Secret Service agents. After reviewing the above-referenced history of the Fourth Amendment, *id.* at 156-58, Judge Weinstein emphasized that "an authorized search, while necessary, can often result in a severe and offensive violation of a person's privacy." As a result, "[p]articipation by the media in this invasion of privacy must be scrutinized carefully." *Id.* at 158. In support of this proposition, Judge Weinstein cited 18 U.S.C. § 3105, which provides that a search warrant " 'may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.*' " *Id.* (emphasis added).

The origins of § 3105 may be traced to English common law,[25] and its requirements were first noted in *Bell v. Clapp*, 10 Johns. 263, 6 Am. Dec. 339 (Sup. Ct. 1813), an influential decision of the New York Supreme Court.[26] It was codified in 1881 in the New York Code of Criminal Procedure.[27] As part of the Espionage Act of 1917, Congress adopted New York's statute verbatim. NASCAT respectfully submits that § 3105 should be understood as a modern-day codification of one of the "core" protections against general warrants and writs of assistance embedded in the Fourth Amendment. The facts of this case, as explicated by the court below, Pet. App. at 4a-6a [129 F.3d at 508-09], can only be understood and applied by this Court through reference to the lengthy historical record of general warrants and writs of assistance under

---

[25] *See* II Sir Matthew Hale, *The History of the Pleas of the Crown* 150 (First American Ed., 1847, of original English publication in 1736) (stating that warrants "ought to be directed to constables and other public officers, whereof the law takes notice, and not to private persons, tho it is fit the party complaining should be present and assistant, because he knows his goods").

[26] This Court and other courts have often cited *Bell v. Clapp* as accurately reflecting the common law of search and seizure derived from English practice. *See, e.g., California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring); *United States v. Beckford*, 962 F. Supp. 767, 773 (E.D. Va. 1997); *United States v. Maresca*, 266 F. 713, 722 (S.D.N.Y. 1920); *State v. Attaway*, 870 P.2d 103, 108-09 (N.M. 1994); *Moran v. State*, 644 N.E.2d 536, 539 (Ind. 1994); *Spangler v. Booze*, 49 S.E. 42, 45 (Va. 1904).

[27] *See* N.Y. Code Crim. Proc. § 798 (1882) ("A search warrant may, in all cases, be served by any of the officers mentioned in its direction, but by no other person, except in aid of the officer, on his requiring it, he being present and acting in its execution."); *People v. Milone*, 195 N.Y.S. 488, 490-91 (Sup. Ct. 1922).

which Crown officers "bedeviled the colonists." *Stanford*, 379 U.S. at 481. As early as 1603 – nearly four centuries ago – Lord Coke established in *Semayne's Case* that intrinsic to the validity of the specific warrant *was that it had to be executed by a properly commissioned officer to further the government's purposes, not to further the purposes of a private party, like the news media in this case*. 5 Co. Rep. at 92b, 77 Eng. Rep. at 198; *see also Buonocore*, 65 F.3d at 354. Yet, that is precisely what Petitioners did in this case; the facts in the record demonstrate that Petitioners cooperated with and facilitated the news media's general search of Respondents' home and property. Pet. App. 4a-6a [129 F.3d at 508-09]. The search "was jointly planned by [Petitioners] and the media . . . so that [Petitioners] could assist in the media obtaining material for their commercial programming. . . . *This search stands out as one that at all times was intended to serve a major purpose other than law enforcement.*" Pet. App. 9a-10a [129 F.3d at 510] (emphasis added).

D. Given The Historical Foundations Of The Fourth Amendment, The Court Below Correctly Found That Petitioners' Conduct Constituted An Unreasonable Search And Seizure

In this case, faithfully adhering to this Court's precedents in search-and-seizure cases, the Ninth Circuit properly ascertained "the historical foundations of the Fourth Amendment." Pet. App. 11a [129 F.3d at 511]. The court below concluded that Petitioners' conduct violated Respondents' Fourth Amendment protections against unreasonable searches because their actions were " '*nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists.*' " *Id.* (emphasis added) (quoting *Anderson*, 441 N.Y.S.2d at

226). Like the Fourth Circuit in *Buonocore*, the Ninth Circuit correctly held that " '[t]he right to be free from government officials facilitating a private person's general search' " was " ' "manifestly included" ' " within the 'core' Fourth Amendment protection" and that Petitioners could be held liable for violating the Fourth Amendment by allowing agents of the news media to accompany them when they executed the warrant upon Respondents' property. *Id.* (quoting *Buonocore*, 65 F.3d at 357). And like the Second Circuit in *Ayeni*, the court below emphasized that Petitioners' conduct "was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right of privacy." 35 F.3d at 686; *see* Pet. App. 9a-13a [129 F.3d at 510-12]. As Chief Judge Newman of the Second Circuit stated in *Ayeni*:

> It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant. [Secret Service agent] *Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.*

35 F.3d at 686 (emphasis added). The principles elucidated by the Second Circuit in *Ayeni*, as echoed by the Fourth Circuit in *Buonocore* and by the Ninth Circuit in

the present case, are consistent with the well-settled historical foundations of the Fourth Amendment repeatedly recognized in this Court's decisions and should be resoundingly ratified by this Court.

II. THE COURT BELOW PROPERLY FOUND THAT PETITIONERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY FOR THEIR ACTIONS

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court articulated the current standard for "good faith" or "qualified" immunity:

> [G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Id. at 818. As the court below elucidated this standard, "[r]egardless of whether a constitutional violation has occurred," Petitioners are "entitled to qualified immunity if they could reasonably have believed that their conduct violated no clearly established federal statutory or constitutional rights." Pet. App. 10a [129 F.3d at 511]. As the Fourth Circuit noted in *Buonocore*, however, "there is no requirement that the 'exact right allegedly violated' be previously 'specifically recognized by a court' in order for it to be held ' " 'clearly established' " for qualified immunity purposes.' " 65 F.3d at 356-57 (citation omitted). "Rather, ' " '[c]learly established' " in this context includes not only specifically adjudicated rights *but those manifestly included within more general applications of the core constitutional principle invoked.*' " *Id.* at 357 (emphasis added) (citing, *inter alia*, *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In *Buonocore*, 65 F.3d at 357, the Fourth Circuit found that "[t]he right to be free from government officials facilitating a private person's general search . . . is 'manifestly included' within 'core' Fourth Amendment protection," holding that the allegation that a federal agent and deputy sheriff invited a private citizen into the plaintiff's home so that a private citizen, acting independently of government agents, could conduct a search for items that were not mentioned in the search warrant, stated a violation of a clearly established constitutional right. In *Ayeni*, 35 F.3d at 684-88, the Second Circuit had earlier reached the same result, holding that an objective, reasonable Secret Service agent could not have concluded that inviting a television crew (or any third party not providing assistance to law enforcement) to participate in the search of a private home was within Fourth Amendment requirements.[28] And in this case, after citing and discussing *Buonocore* and *Ayeni*, the court below emphasized that "no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement

---

[28] In *Hagler v. Philadelphia Newspapers*, C.A. No. 96-2154, 1996 U.S. Dist. LEXIS 9931 (E.D. Pa. July 10, 1996), Senior Judge VanArtsdalen "adopt[ed] the reasoning of the Second Circuit" in *Ayeni*, *id.* at *7, stating in relevant part:

> It should have been obvious to the [police] officers . . . that a warrant issued only in the name of the officers, for the limited purpose of searching for narcotics, did not authorize them to allow members of the media to enter a private home. A reasonable person would know that the purpose of a warrant is to facilitate proper law enforcement, not to provide a "photo opportunity." *A search warrant is simply not a press pass.*

Id. (emphasis added)

purposes, and where the videotaping and sound recording were outside the sound of the warrant." Pet. App. 11a-12a [129 F.3d at 511]. Clearly, Respondents' right to be free from Petitioners' facilitating the news media's general search of their home is "manifestly included" within "core" Fourth Amendment protection, and the court below (like the Fourth Circuit in *Buonocore* and the Second Circuit in *Ayeni*) correctly held that Petitioners were not entitled to qualified immunity in this case.

III. CONCLUSION

For the reasons stated, NASCAT respectfully submits that the decision of the Ninth Circuit should be affirmed.

DATED: January 27, 1999

KEVIN P. RODDY
Counsel of Record
MILBERG WEISS BERSHAD
& LERACH LLP
355 South Grand Avenue
Suite 4170
Los Angeles, CA 90071
Telephone: 213/617-9007

Counsel for Amicus Curiae, NASCAT

(9)

FILED
JAN 27 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1927

In The

Supreme Court of the United States

October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. McLEAN, RICHARD C. BRANZELL and ROBERT PRIESKAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENTS

JOSHUA L. DRATEL
(Counsel of Record)
JOSHUA L. DRATEL, P.C.
14 Wall Street, 28th Floor
New York, New York 10005
(212) 732-0707

Counsel for Amicus National Association of Criminal Defense Lawyers

Of Counsel
BARBARA BERGMAN

36pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES .....

INTEREST OF *AMICUS CURIAE* 2

STATEMENT 3

SUMMARY OF ARGUMENT 3

ARGUMENT

I. THE COURT BELOW WAS CORRECT IN HOLDING THAT PETITIONERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY LAW ENFORCEMENT OFFICERS DURING THE EXECUTION OF A JUDICIALLY AUTHORIZED SEARCH WARRANT UPON RESPONDENTS' PERSON AND PROPERTY 6

A. *The News Media's Presence During Search Warrant Executions Does Not, and Will Not, Have the Effect of "Improving Public Oversight"*

of Law Enforcement Conduct and Activities 6

B. *The News Media's Presence During Search Warrant Executions Violates the Searched Individuals' Fourth and Fifth Amendment Rights, as Well As Federal Law (18 U.S.C. §3105)* 9

C. *The News Media's Presence During Search Warrant Executions Creates A Dangerous Situation for All Persons Involved in the Search* 17

D. *The News Media's Presence During Search Warrant Executions Creates the Self-Fulfilling Need for the Search to Yield Incriminating Evidence and a Subsequent Criminal Prosecution* 20

E. *This Court, and Several Statutes, Establish That Certain Aspects of a Criminal Investigation Are Not Subject to Any "Public Right to Know," and the Warrant Execution Falls Squarely Within That Secret and Confidential Framework* 25

CONCLUSION 29

CASES

Anderson v. WROC-TV, 109 Misc.2d 904, 441 N.Y.S.2d 220 (Sup. Ct. Monroe Co. 1981) 14,15

Associated Press v. NLRB, 301 U.S. 103 (1937) 13

Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994) 12

Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995) 8,9,10,11, 12,18,21

Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998) 7,11,13,16, 22,24

Boyd v. United States, 116 U.S. 616 (1886) 11

Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) 11,12,13, 21,22

Butterworth v. Smith, 494 U.S. 624 (1990) 25,26

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) 26

Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) 13,14

Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) 13

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) 10

Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) 10

Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) 26,27

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 26

Soldal v. Cook County, 506 U.S. 56 (1992) 11

Steagald v. United States, 451 U.S. 204 (1981) 11

United States v. Aguilar, 515 U.S. 593 (1995) 26

United States v. Sanusi, 813 F. Supp. 149 (E.D.N.Y. 1993) 8, 11, 27

Wilson v. Layne, 141 F.3d 111 (4th Cir.) (*en banc*), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998) 12,17,18,19

STATUTES

United States Constitution, Amendment I . . . 4,10,11,13, 14,15,27,28

United States Constitution, Amendment IV .... passim

United States Constitution, Amendment V. 4,5,9,16

United States Constitution, Amendment VI 16

18 U.S.C. §2232 (c) 26

18 U.S.C. §2518 (8)(b) 26

18 U.S.C. §3105 . . . . . 9,11,12,13, 14,15,16,27

Rule 6(e), Fed.R.Crim.P. 25

OTHER AUTHORITIES

United States Attorneys' Manual, VII.D. 19

David Tobenkin, *"Stations Face New Reality: Syndicators Have Host of Offerings, Including Magazine, Health, Law Enforcement Entries,"* Broadcasting & Cable,

January 23, 1995, at 58 21

"Home: No Place For 'Law Enforcement Theatricals' – the Outlawing of Police/Media Home Invasions in Ayeni v. Mottola," 16 Loy.L.A.Ent.L.J. 325 (1996) 21

In The
Supreme Court Of The United States

OCTOBER TERM, 1998

No. 97-1927

RODNEY C. HANLON, JOEL SCRAFFORD,
KRIS A. McLEAN, RICHARD C. BRANZELL
and ROBERT PRIESKAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is submitted in support of Respondents Paul W. Berger and Erma R. Berger. By letters filed with the Clerk of the Court, Petitioners and

Respondents have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice,

---

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

which includes preserving the integrity of the criminal justice process, ensuring the rights guaranteed persons by the Fourth Amendment to the United States Constitution, and providing fair trials to persons accused of crimes.

As a result, NACDL, consistent with its mission, files this brief *amicus curiae* in support of Respondents' claim that the Court of Appeals was correct in holding (a) that Petitioners violated clearly established proscriptions of the Fourth Amendment by allowing members of the media to join, film, and effectively participate in a search of Respondents' property pursuant to a judicially authorized warrant; and (b) as a consequence, Petitioners did not enjoy qualified immunity for their conduct.

STATEMENT

Amicus adopts Respondents' statement of the case.

SUMMARY OF ARGUMENT

This case presents an issue of fundamental importance to the integrity of the criminal justice system: whether, as Petitioners' first Question Presented asks, law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant. The Ninth Circuit correctly answered that question in the affirmative, and also denied Petitioners qualified immunity as a result.

In support of Petitioners, two dozen news media companies and/or organizations (hereinafter "News Media *Amici*") have submitted a Brief *Amici Curiae*. This Brief *Amicus Curiae* by NACDL, from the perspective of practicing lawyers intimately involved in the state and federal criminal justice system, and in the protection of the constitutional rights of suspects, defendants, and all others, addresses the arguments made by the News Media *Amici*.

In fact, the News Media *Amici*, in headlong pursuit of their alleged First Amendment prerogatives to use the auspices of government law enforcement authorities to invade the privacy of individuals and violate their Fourth (and Fifth) Amendment rights, barely acknowledge the critical Fourth Amendment principles at stake.

Indeed, ironically, in positing a list of purely hypothetical remedial purposes and effects – for putative defendants, as well as for the public at large – of media participation in the execution of search warrants, and in seeking a case-by-case review of the propriety of the news media's participation, the News Media *Amici* miss the largest point of all: that the news media's *very intrusion itself* into the warrant execution process necessarily constitutes not only a violation of federal law, but also an abuse of the warrant execution process, and of the searched person's Fourth Amendment rights – an abuse so significant that it cannot be adequately ameliorated by any theoretical benefit to the public at large.

The proof is in the pudding, so to speak: the facts of this case, as well as other cases involving media participation in search warrant execution, do *not* support the News Media *Amici*'s fanciful description of a tonic effect; rather, they establish convincingly that such media participation is a prescription for constitutional violations, for chaos, for danger, and for an unwarranted, unnecessary, and potentially corrupting interference in the criminal justice process.

In addition, as detailed below, the News Media *Amici* are simply wrong in their analysis that any public "right to know" exists in this context, or that it supersedes an individual's Fourth Amendment and/or Fifth Amendment protections. In many contexts, statutes and this Court's prior decisions have established that the public is not properly privy to certain aspects of the criminal justice investigative process, and that the very integrity of that process – for both law enforcement and accused alike – depends on secrecy and confidentiality.

Accordingly, *amicus* NACDL respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed, and Respondents' cause of action be permitted to go forward.

ARGUMENT

I. THE COURT BELOW WAS CORRECT IN HOLDING THAT PETITIONERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY LAW ENFORCEMENT OFFICERS DURING THE EXECUTION OF A JUDICIALLY AUTHORIZED SEARCH WARRANT UPON RESPONDENTS' PERSON AND PROPERTY

A. *The News Media's Presence During Search Warrant Executions Does Not, and Will Not, Have the Effect of "Improving Public Oversight" of Law Enforcement Conduct and Activities*

In their Brief, the News Media *Amici* contend that prohibiting members of the news media from accompanying law enforcement officers during the execution of search warrants would "eliminate the only means by which the press and public can monitor abuses of that [police search] power firsthand." News Media *Amici* Brief at 8.

That is nonsense, since there is not the slightest incentive for the news media to perform that role in this context. Indeed, as the News Media *Amici* admit, "media representative are typically permitted to observe searches and seizures only at the sufferance of law enforcement

officials." *Id.*

Since the news media's continued access to search warrant executions is dependent on the good graces of the law enforcement community, no basis exists to believe that there will be any "monitoring" of those persons upon whose discretion the news media relies for future opportunities to cover such activity.

Nor, obviously, was the news media's involvement in this case designed to keep law enforcement officials "honest," or for any other such high-minded public purpose. There is not any reference in the letter agreement between Cable News Network (hereinafter "CNN") and the government to any "monitoring" purpose; nor was there any such reportage afterward, even though, for example, the agent in charge clearly lied to the Bergers in claiming that the search warrant permitted search of *all* buildings on the property (when the warrant explicitly excluded the Bergers' residence).

Indeed, the News Media *Amici*'s claim of some "monitoring" role is insupportable in light of the letter agreement, which made CNN a virtual co-venturer with the government in the search and prosecution of the Bergers. *See Berger v. Hanlon*, 129 F.3d 505, 508 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998); J.A. 90-91.

Thus, the News Media *Amici*'s "monitoring"

argument is merely a futile *post hoc* rationalization for a brazen commercial enterprise by CNN, with commercial objectives – satisfying the program's agenda, and obtaining ratings in the process.

Moreover, in other cases, the presence of the news media has not provided any "oversight" function or impact upon law enforcement misbehavior.

For example, in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied,* 514 U.S. 1062 (1995), in which the search was directed at Mr. Ayeni's alleged participation in credit card fraud, the agents entered the apartment by force *prior* to the warrant being signed, forced Mrs. Ayeni and her child to be videotaped by the news media representatives, and broke furniture in the course of the subsequent search. The only item seized was a photograph of Mr. Ayeni's family. *Id.* at 683. In addition, the searching agents acted in contravention of the United States Attorney's prohibition on bringing news media representatives along. *United States v. Sanusi*, 813 F. Supp. 149, 161 (E.D.N.Y. 1993).[2]

Nevertheless, the tape in *Ayeni* was not broadcast, obviously because it did not yield anything incriminating with respect to the *suspect*. The evidence of law enforcement misconduct, on the other hand, apparently was

---

[2] *Sanusi* was the title of the criminal case in which Mr. Ayeni was prosecuted.

not considered newsworthy, even, presumably, for its "oversight" value.

Ultimately, it has not been the news media that has exposed and/or challenged such abuses. Instead, the injured parties themselves have had to institute lawsuits, seeking redress in the courts to vindicate their rights that were trampled as a result of news media and government collusion.

B. *The News Media's Presence During Search Warrant Executions Violates the Searched Individuals' Fourth and Fifth Amendment Rights, as Well As Federal Law (18 U.S.C. §3105)*

In extolling the (as yet unrealized) benefits of media participation in search warrant execution, the News Media *Amici* argue that "[t]he mere observation and recording of a search by the news media, and subsequent public dissemination of what was observed should not – without more – constitute a violation of the Fourth Amendment." News Media *Amici* Brief at 9.

That, however, misses the most important point: that the news media's presence, when in collaboration with the government and on private property, *itself* represents an egregious violation of the Fourth Amendment as well as of federal law.

As the Second Circuit explained in *Ayeni v.*

Mottola, the unreasonableness of the news media's presence with the searching agents in the Ayeni home

> in Fourth Amendment terms [was] heightened by the fact that . . . it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right to privacy. The purpose of bringing the CBS camera crew into the Ayenis' home was to permit public broadcast of their private premises and thus to magnify needlessly the impairment of their right to privacy.

35 F.3d at 686.

Here, in suggesting some "balancing" is appropriate, the News Media *Amici* completely fail to recognize that the marginal alleged First Amendment benefit, which, as noted above, has yet to materialize, pales before the Fourth Amendment violation, which eviscerates entirely the the essence of the rights it was designed to

protect.[3]

Indeed, this issue reaches the heart of the Fourth Amendment's sources, implicating the evils of "general warrants" and "writs of assistance." *See Steagald v. United States*, 451 U.S. 204, 220 (1981); *Boyd v. United States*, 116 U.S. 616, 624-25 (1886); *Buonocore v. Harris*, 65 F.3d 347, 353-55 (4th Cir. 1995); *United States v. Sanusi*, 813 F. Supp. at 157. *See also Ayeni v. Mottola*, 35 F.3d at 684-85 ('[t]he protection of privacy from encroachment by governmental officers is the '"principal" object of the [Fourth] Amendment'") *citing and quoting Soldal v. Cook County*, 506 U.S. 56, 64 (1992) (other citations omitted).

In addition, the news media's presence during the

---

[3] Also, the News Media *Amici*'s citation to trial closure cases [*i.e., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980)] is unavailing. A trial is presumptively an open and public proceeding, and closure is permitted under only the rarest of circumstances. The opposite is true for the warrant execution process, since the tradition of the Fourth Amendment, and the provisions of 18 U.S.C. §3105, make the execution of a warrant the exclusive province of law enforcement. Thus, while "balancing" First Amendment interests is appropriate in the trial context, it is not in the warrant execution arena. Therefore, the closure cases are completely inapposite here.

execution of a search warrant violates 18 U.S.C. §3105, which prohibits the presence of persons other than the law enforcement officers executing the warrants, or persons "in aid" thereof. *See Ayeni v. Mottola*, 35 F.3d at 687. *See also Berger v. Hanlon*, 129 F.3d at 511; *Buonocore v. Harris*, 65 F.3d at 357-58.[4]

Section 3105 does not provide *any* exceptions, for members of the news media or anyone else, and they are subject to its proscriptions just like every other private party. As the District Court in *Ayeni* noted, "CBS had no greater right than that of a thief to be in the home, to 'capture' the scene of the search on film and to remove the photographic record." *Ayeni v. CBS, Inc.*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994).[5]

---

[4] Members of the news media cannot be present "in aid of" law enforcement officers executing the warrant, as suggested by a plurality of the Fourth Circuit in *Wilson v. Layne*, 141 F.3d 111, 116 (4th Cir.) (*en banc*), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), while at the same time performing some independent "oversight" function, as the News Media *Amici* assert. In fact, the news media are not present in such circumstances for either reason, but rather to exploit the broadcast and/or publication potential of the event for commercial advantage.

[5] *Ayeni v. CBS, Inc.*, became *Ayeni v. Mottola*, on appeal after CBS settled with the Ayenis and Agent Mottola and the other law enforcement officers involved appealed the District Court's refusal to apply qualified immunity to their conduct.

Nor is there any reason to treat members of the news media any differently from other private parties, since the First Amendment is not a license to commit tortious or illegal conduct. As this Court stated in *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937), "[t]he publisher of a newspaper has no special immunity from the application of general laws. *He has no special privilege to invade the rights and liberties of others*." (Emphasis added).

That principle has also been extended to the newsgathering function. For example, in *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973), the Second Circuit noted that "[c]rimes and torts committed in newsgathering are not protected[.]" Likewise, in *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971), the Ninth Circuit pointed out that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."

Thus, the news media cannot rely upon the First Amendment to escape liability for its representatives' trespass upon the Bergers' property, and for their violation of 18 U.S.C. §3105. *See Berger v. Hanlon*, 129 F.3d at 516-17. *See also Buonocore v. Harris*, 65 F.3d at 359

("[t]o conclude otherwise [in the context of a private employer's access to searched premises] would authorize law enforcement officers to invite private individuals to engage in conduct that would constitute trespass were it not conducted under the guise of a search warrant. Neither the Fourth Amendment nor §3105 grants government agents such authority").

Nor does the pursuit of law enforcement operations provide the news media an excuse. As the Ninth Circuit elaborated in *Dietemann v. Time, Inc.*,

> [t]he First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office. *It does not become a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.*

449 F.2d at 249 (emphasis added).[6]

---

[6] In *Anderson v. WROC-TV*, 109 Misc.2d 904, 441 N.Y.S.2d 220, 226 (Sup. Ct. Monroe Co. 1981), in which a homeowner sued news media outlets for trespass after they had been invited by a Humane Society

Consequently, the News Media *Amici*'s arguments fail because legitimate First Amendment interests were *not* at stake in the news media's presence during the search of the Bergers' property. In fact, considering the irreparable damage the news media can do to the rights protected by the Fourth Amendment with respect to an individual's privacy, *see, e.g., Ayeni v. Mottola,* 35 F.3d at 686, the news media should be particularly subject to the strictures of §3105. That is especially true here, since the application for the warrant failed to inform the judicial officer of the planned presence of the news media during the warrant's execution.

While Section 3105 codifies clearly established

---

investigator to attend the execution of a search warrant, the Court hearkened back to the origins of the Fourth Amendment:

> [i]f the media were to succeed in compelling an uninvited and non-permitted entry into one's private home whenever it chose to do so this would be nothing less than a general warrant equivalent to the writs of assistance which were so odious to the American colonists.

Fourth Amendment principles, and provides an unassailable legislative basis for the blanket proscription against the presence of non-law enforcement personnel, the News Media *Amici* never address the statute.

Nor do they discuss the Fifth Amendment Due Process implications of news media presence during search warrant executions, and the subsequent dissemination of information and images obtained as a result. Pre-trial publicity of this type is most prejudicial, and is amplified by the news media's active and coordinated participation in law enforcement activities.[7]

Thus, the News Media *Amici* do not provide any basis for departing from traditional Fourth Amendment principles, and/or from the unequivocal terms of §3105 reflecting those standards, which establish that the presence of persons *not* assisting law enforcement in the execution of the warrant constitutes a violation of the

---

[7] Additional Fifth and Sixth Amendment concerns are raised by the prospect of statements made by persons searched that are recorded by news media microphones, or of uncounseled statements made to news media representatives absent appropriate *Miranda* warnings. *See Berger v. Hanlon,* 129 F.3d at 513. Moreover, the whole doctrine of "consent" is skewered by the intimidating presence of cameras, lights, microphones, and other attendant features of news media coverage.

fundamental protections afforded by the Fourth Amendment. As a result, exceptions and/or "balancing" should not be countenanced.

C. *The News Media's Presence During Search Warrant Executions Creates A Dangerous Situation for All Persons Involved in the Search*

The News Media *Amici* would permit the presence of untrained, unarmed, and unidentified members of the news media during the execution of search warrants. That is a prescription for disaster. Equipped with cameras, lights, and microphones – provocative instruments, particularly when the home or residential property is invaded – the news media create a volatile mix that would breed chaos and confusion at precisely the worst time.

For instance, the presence of a television crew or newspaper photographer could lead the searched person to believe that it is *not* the police, but rather the news media, that has entered his or her dwelling. That surely increases the possibility of a confrontation and disobedience to instructions from law enforcement officers.

Just as surely, the glare of television lights, or the focus of a camera lens, is far more likely to incite a panic reaction and inappropriate behavior by the person being searched. Thus, the Fourth Circuit's surmise in *Wilson v. Layne*, 141 F.3d 111, 116 (4th Cir.) (*en banc*), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), that news

media presence "afford[s] protection to the officers by reducing the possibility that the target of the warrant will resist arrest in the face of recorded evidence of his actions[,]" is refuted by both logic and experience.

Indeed, the facts of the cases prove the opposite, and provide far more revealing and illustrative evidence of the frightening possibilities for catastrophe. For example, in *Ayeni v. Mottola*, the presence of the news media *caused* a physical confrontation.

In *Ayeni v. Mottola,* the suspect [Mr. Ayeni] was not at home, but his wife [Mrs. Ayeni] and child were. As the Second Circuit recounted,

> Mrs. Ayeni objected to the videotaping of herself and her son. She tried to avoid the camera by covering her face with a magazine. [The child] was crying and told his mother that he was frightened. When Mrs. Ayeni attempted to shield her son's face with a magazine, [the agent] grabbed the magazine out of her hand, threw it on the floor, and told the plaintiffs to "shut up."

35 F.3d at 683. The agents then "directed the camera crew to videotape Mrs. Ayeni's face." *Id.*

In *Wilson v. Layne,* the presence of a newspaper photographer apparently precipitated the altercation between the law enforcement officers executing the warrant and Mr. Wilson, in which Mr. Wilson reacted angrily to a congregation of officers and reporters (looking for Mr. Wilson's son) in his living room in the morning hours, and found himself on the floor with a gun pointed at his head. As Mr. Wilson testified in his deposition when asked what "about those two people [*The Washington Post* reporters] did upset you?": "[o]ne person was taking pictures of me in the nude. Well, I had on a pair of briefs. I thought that was wrong." *See* Joint Appendix in *Wilson v. Layne*, No. 98-83, at 45.

Aside from the critical safety issues, there are many other reasons why prudent law enforcement authorities would *exclude* members of the news media from warrant executions, including the fact that wide public dissemination might alert other targets of the investigation, endanger informants who provided information for the warrant application, and reveal and/or discourage cooperation at an early and advantageous stage of the proceedings. Perhaps that is why the United States Attorneys' Manual was amended May 3, 1993, less than two months after the search in this case, to deny members of the news media the right to be present at the execution of search warrants (and/or confidential pre-execution

briefings). *United States Attorneys' Manual*, at 1-7.0000, VII.D.

Thus, the Department of Justice has tacitly recognized that the presence of the news media during the execution of search warrants is the equivalent of a lighted match in the vicinity of a tinderbox.

D. *The News Media's Presence During Search Warrant Executions Creates the Self-Fulfilling Need for the Search to Yield Incriminating Evidence and a Subsequent Criminal Prosecution*

Permitting members of the news media to be present during the execution of search warrants will also have significant adverse effects on searches and their aftermath. The searches will be judged not on their merits, but on whether they justified media coverage. Thus, searches will *require* results because only then will law enforcement officials be able to justify media presence, and only then will future media interest in law enforcement operations be ensured.

This self-fulfilling aspect of news media presence corrupts not only the search, but also what actions follow. A search that is the subject of news media coverage will have to spawn a prosecution in order to appear justified.

Conversely, searches attended by the news media would be too easily prone to abuse by the news media, to

create more compelling "real-life television drama," and by individual prosecutors to advance their careers and/or other personal agendas.[8] The objective of the search would no longer be for evidence *per se*, but for something that would justify current and future media involvement and exposure. As the Second Circuit declared eloquently in *Ayeni v. Mottola,* "[a] private home is not a sound stage for law enforcement theatricals." 35 F.3d at 686.

That perversion of the purpose of the warrant runs afoul of a centuries-old requirement:

> as early as 1603, it was established in the common law that intrinsic to the validity of the specific warrant was that it had to be executed by a properly commissioned officer to

---

[8] The popularity, proliferation, and profitability of "reality-based" law enforcement television programs is discussed in Elsa Y. Ransom's article "Home: No Place For 'Law Enforcement Theatricals' – the Outlawing of Police/Media Home Invasions in *Ayeni v. Mottola,*" 16 Loy.L.A.Ent.L.J. 325 (1996), *citing* David Tobenkin, "Stations Face New Reality: Syndicators Have Host of Offerings, Including Magazine, Health, Law Enforcement Entries," *Broadcasting & Cable*, January 23, 1995, at 58.

> further the *government's purpose*. Even a duly authorized officer could not execute a warrant to further the purposes of a private individual.

Buonocore v. Harris, 65 F.3d at 354 (emphasis in original) (citation omitted).

Here, too, the Ninth Circuit concluded below that "[t]his search stands out as one that at all times was intended to serve a major purpose other than law enforcement." *Berger v. Hanlon*, 129 F.3d at 510. As the Court added, CNN "wanted footage of the discovery of evidence showing that Paul Berger was poisoning eagles, and the government wanted the publicity." *Berger v. Hanlon*, 129 F.3d at 507.

The symbiosis of intent and objective here created the worst possible result. In fact, this case presents a perfect yet unfortunate manifestation of the inevitable corruption of the integrity of the search warrant execution process:

- there was a letter agreement between the government and the media that created a unity of purpose: to target and prosecute a particular person in order to promote a particular agenda;

- that common agenda resulted in a search that was "jointly planned" by the news media and law enforcement "so that the [law enforcement] officials could assist in the media obtaining material for their commercial programming," *id.*;

- in order to create that opportunity, the government relied on stale information about the Bergers;

- the government did not find the evidence it sought or expected to find; and

- the indictment did not reflect that limited yield, but instead substantially overcharged Mr. Berger.

The absence of evidence ultimately resulted in a drastic reduction of the charges that were submitted to the jury, and Mr. Berger was convicted of only a misdemeanor involving the misuse of a pesticide rather than the unlawful killing of protected wildlife. Yet the Bergers were compelled to endure worldwide opprobrium from CNN solely because of the law enforcement officials' and news media's abrogation of their Fourth Amendment rights.

The prospect of media coverage and favorable publicity also produces a powerful temptation for

aggrandizement (through either personal celebrity, professional advancement, and/or promotion of a political agenda) that is entirely at odds with a prosecutor's or law enforcement officer's public mission. Here, the record makes it clear that the agents and the news media shared a common political goal they hoped to accomplish via the search of the Bergers' property and the prosecution of Mr. Berger. *See* Joint Appendix at 63-64 (Complaint at ¶ 83).

Moreover, as the Ninth Circuit pointed out below,

> the record in this case suggests that the government officers planned and executed the search in a manner designed to enhance its entertainment value, by engaging in, for example, conversations with Mr. Berger for the purpose of providing interesting soundbites, and to portray themselves as tough, yet caring investigators, rather than to further their investigation.

129 F.3d at 515.

Absent the media focus that enhanced the importance of the search, and the need to recover evidence, it is it respectfully submitted that the Bergers' property would likely not have been searched, and almost surely Mr. Berger would not have been prosecuted. Nevertheless, the media's involvement arguably was responsible for both the search and the prosecution. It is that corruption of the criminal justice system, of the prosecutorial function, and of the protections guaranteed by the Fourth Amendment, that must be prevented.

E. *This Court, and Several Statutes, Establish That Certain Aspects of a Criminal Investigation Are Not Subject to Any "Public Right to Know," and the Warrant Execution Falls Squarely Within That Secret and Confidential Framework*

The News Media *Amici* rely on the public's "right to know" as a basis to invade a person's home and property in the company of law enforcement executing a search warrant. However, there is ample precedent for circumscribing any "right to know" in the context of criminal investigations and proceedings.

For instance, in the grand jury context, Rule 6(e), Fed.R.Crim.P., mandates secrecy of grand jury proceedings. Certainly, allowing a reporter into the grand jury cannot be justified based on any "right to know." Moreover, this Court has indicated that the legislature may properly prevent even a witness before the grand jury from

revealing the content of his or her testimony during the pendency of the grand jury investigation. *See Butterworth v. Smith*, 494 U.S. 624, 632 (1990).[9]

Similarly, 18 U.S.C. §2518(8)(b), provides that wiretap recordings shall be promptly sealed, and disclosed only pursuant to court order. It cannot be argued by the News Media *Amici* that it has the right to such recordings merely upon the invitation of law enforcement authorities. *See also United States v. Aguilar*, 515 U.S. 593, 605-05 (1995) (upholding validity of18 U.S.C. §2232(c), which prohibits the disclosure of any wiretap interception even

---

[9] The defining difference between cases in which this Court has refused to apply such non-disclosure statutes and this case is that in the other cases the information was derived *independent* of the law enforcement function (through either diligent research or investigation and/or unauthorized leaks from official sources), while here the news media's access to the information was *dependent* on its action in conjunction with, and with the formal approval of, law enforcement. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 99 (1979); *Cox Broadcasting v. Cohn*, 420 U.S. 469, 495 (1975) ("States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection").

after the wiretap may have expired).[10]

Section 3105, discussed **ante**, at 12-13, establishes the importance of secrecy and exclusivity of access in the warrant context, and in so doing is entirely consistent not only with the sections cited above, but also with the purposes of the Fourth Amendment.

Thus, it is commonplace for a criminal investigation to proceed free of scrutiny from the news media, and for disclosure to be controlled by the courts rather than agents or prosecutors. Such secrecy insulates the investigation from premature and inappropriate disclosures, and protects a suspect from negative and prejudicial publicity in the event (a) the investigation does not produce a prosecution; or (b) an indictment and/or trial ensues.

There is no reason to disturb this operation of the criminal justice system, and the News Media *Amici* have not advanced any rationale that could justify jeopardizing the balance achieved between legitimate law enforcement objectives and a prospective defendant's rights.

As the District Court noted in *United States v.*

---

[10] In the civil context, this Court has held that a newspaper could be barred by a protective order from publishing information it acquired via discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984).

Sanusi, "the First Amendment is a shield, not a sword." 813 F. Supp. at 160. Thus, "[e]ven a reporter must accept limits on how far upon another person's privacy he or she may intrude." *Id.*

Here, the News Media *Amici* seek to abolish such necessary limits, and to use the First Amendment as a sword that cuts a broad and mortal swath across the Fourth Amendment, the integrity of the warrant execution process in particular, and the entire criminal justice system in general. It is respectfully submitted that such a result cannot be permitted.

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Respondents' Brief, it is respectfully submitted that the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed in all respects.

Dated: 26 January 1999
New York, New York

Respectfully submitted,

JOSHUA L. DRATEL
(*Counsel of Record*)
JOSHUA L. DRATEL, P.C.
14 Wall Street
28th Floor
New York, New York 10005
(212) 732-0707

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

Of Counsel

Barbara Bergman
Lisa Kemler